United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

161

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15277

852

DAVID DUKES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals
For the
District of Columbia Circuit

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Joseph W. Stewart
CLERK

No. 15277

STATEMENT OF QUESTIONS PRESENTED

In the opinion of appellee the following questions are presented:

1. Where a reputable matron was held up on a dark and deserted street and forced into an alley where she was robbed and raped, was her testimony sufficiently corroborated by an immediate complaint, traces found at the scene, by recovery from appellant of articles stolen, and many other corroborating circumstances?

2. Where there was evidence that appellant was a sociopathic personality who became psychotic as a result of incarceration for the crime, was it error to submit to the jury the question of appellant's mental condition as of the date of the crime?

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The indictment charged appellant, David Dukes, with having, on November 4, 1954, robbed Ruth L. Davis (count one) and of raping her (count two). Found guilty by a jury on both counts (Tr. 237), appellant was sentenced to serve five to fifteen years on count one and ten to thirty on count two, the sentence for rape to run concurrently with the robbery sentence. This appeal is from the judgment of conviction.

(a) The commission of the crime

On the evening of November 3, 1954 Mrs. Ruth Lydia Davis, then thirty and the mother of three children, was living in the northeast section of the city (Tr. 14, 29). At that time her sister, Mrs. Helen C. Burney, then unmarried and named "Stokes", was living at 3613 Thirteenth St., N.W., which is between Spring Road and a short side street named Otis Place (Tr. 14, 17, 43, 53). Mrs. Davis went to her sister's that evening, arriving about ten P.M. (Tr. 16). While there, as she

does not drink whisky, she had but one-half can of beer (Br. 40; 66) (physical examination of complainant).

The complainant left her sister's a little before midnight (Tr. 17). She was alone as her husband was on the afternoon shift at the Naval Research Laboratory (Tr. 15, 32). Unfamiliar with the neighborhood, Mrs. Davis had received directions to go to a certain bus stop (Tr. 17, 28–29). A short distance from her sister's, appellant overtook Mrs. Davis and asked her what street they were on (Tr. 18, 23). Appellant is a big man, and Mrs. Davis is small of stature (Tr. 41, 186). No one else was on the street (Tr. 19).

Appellant pushed a hard object in the complainant's side, which "felt exactly like a gun" and told complainant " 'This is a stick-up' " (Tr. 18–19). He told Mrs. Davis to be quiet and she would not get hurt; he then directed her to walk toward the alley in the rear of her sister's house (Tr. 19, 55). In the alley appellant took the complainant's pocketbook and, after expressing dissatisfaction with its contents, told her to lay on the ground. When she refused he said " 'Well, I am going to get something out of this' ". When she attempted to remonstrate appellant pressed what seemed to be a concealed pistol in her side (Tr. 19–20). Appellant had taken the complainant into a backyard where he pushed her down on steps leading to the rear entrance of a house (Tr. 19, 21). Forcing her to partially disrobe, the complainant stated that he had "sexual relations" [1] with her (Tr. 21).

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[1] Appellant's second argument (Argument B, Br. 16–19) is that there should have been a judgment of acquittal because the "evidence with respect to rape failed to provide that degree of corroboration through surrounding circumstances required by law" (Br. 16). In this connection appellant points out that when the complainant's answer about sexual relations was repeated by the prosecutor in the form of a question, Mrs. Davis answered "Yes, I guess" (Tr. 21). The prosecutor immediately proceeded to other questions which assumed, in terms, that sexual relations had been accomplished. For example: "Q What did he do then after he had completed his sexual relations?" There was no objection to these questions at all, much less on the basis that, in assuming an unqualified fact, they were not supported by Mrs. Davis' testimony. At argument on the motion for judgment of acquittal the defense made clear it did not consider the complainant had qualified her statement that there had been "sexual relations". Specific objection was to the fact that Mrs. Davis did not employ the term "penetration" (Tr. 93). The defense summed up her

After this, when appellant went through Mrs. Davis' pocketbook, a cigarette lighter and another object fell to the ground. Appellant took possession of the lighter (Tr. 22; Gov. Ex. 1, Tr. 78). He then "grabbed" [3] Mrs. Davis' arm and told her to take off her wristwatch, which he pocketed (Tr. 22; Gov. Ex. 2, Tr. 86).

Appellant wiped his fingerprints off the pocketbook with a handkerchief and returned the purse (Tr. 25). Keeping the concealed weapon or object at all times in the complainant's side, appellant questioned her as to what she was going to do (Tr. 25–26). Receiving the answer that she was going to her sister's to clean up, he questioned her closely as to the number of men there and whether she was going to call the police (Tr. 25–26). On the way out of the alley appellant warned her not to cry out and kept repeating " 'Be quiet and you won't get hurt' ". At the street, appellant walked rapidly away.

The complainant had been gone from her sister's house about a half hour or more (Tr. 33–34, 46). When she returned, according to her sister, Mrs. Burney, "You could tell something was wrong" (Tr. 51). Mrs. Davis told her sister what had occurred and the latter immediately called the police who arrived in less than fifteen minutes (Tr. 26, 34, 47).

Private Irving L. Lupini, of the Metropolitan Police, receiving the dispatcher's call a few minutes before, arrived at 3613 13th Street, N.W., the home of the complainant's sister, at 12:48 A.M., November 4, 1954 (Tr. 53). Shortly thereafter the complainant conducted the witness and Sergeant Elliott of the Sex Squad to the place where the rape had occurred (Tr. 54–55).

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testimony as follows: "She stated that she had sexual relations and, basically, that is the extent of her testimony" (Tr. 92).

The fact of penetration, as well as the general existence of ample corroboration, were otherwise strongly indicated by circumstances. This is demonstrated by the events immediately following the rape of Mrs. Davis. See, e.g., note 3 and text *supra*.

[3] Upon the complainant's return her sister, Mrs. Burney, noticed a scratch on Mrs. Davis' left wrist where the watch had been (Tr. 51, 52). When, later in the month, appellant sold the watch to his cousin, Mrs. Mary Porter, "it had a black band * * * just like it had been snatched off" (Tr. 73). The broken band had to be replaced (Tr. 73–74, 82).

There Sergeant Elliott picked up the complainant's comb which appellant had dropped in searching her pocketbook (Tr. 22, 55–56). A "wet-spot", which "appeared to be semen" was pointed out to Private Lupini on the first step of the stairway leading up to the rear of the house at 3607 Thirteenth Street. Officer Lupini also stated "In front of the steps, about four feet away from it * * * appeared to be toe marks from shoes into the ground" [3] (Tr. 57).

Early that morning the complainant was taken to D.C. General Hospital where vaginal smears were taken (Tr. 31, 65). Mr. Joseph Fedorko, bacteriologist at the hospital, testified that he made an analysis which revealed the cervical smear was "Positive for sperm" (Tr. 68, 70, 131–134).

As had been seen (note 2), later in the month of the crime complainant's watch, bearing the marks of appellant's violence, was recovered from the relative to whom he had sold it. He had told the purchaser he had found it (Tr. 80). The cigarette lighter was found on appellant's person when he was arrested on November 21, 1954 (Tr. 59–61).

(b) The defense of insanity

Appellant was arrested November 21, 1954 (the crime having been committed November fourth) (Tr. 108). On November 25, 1954 Dr. Gerhart J. Gordon, psychiatric clinical director at D.C. General Hospital, began a series of ten examinations of appellant at the jail, the last being February 15, 1955 (Tr. 95). During the span of these examinations appellant's condition got worse (Tr. 101). The doctor's diagnosis was "undifferentiated psychosis" (Tr. 101).

The appellant was received at Saint Elizabeths on May 25, 1955 and released February 27, 1959 (Tr. 143–144). During this period he was under the personal observation of Dr. David J. Owens who saw him very frequently, at least weekly, over this period (Tr. 143). The appellant had extensive treatment throughout his hospitalization (Tr. 148–149). During the first

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[3] Appellant's second argument is that there should have been a judgment of acquittal because the "evidence with respect to rape failed to provide that degree of corroboration through surrounding circumstances required by law". See note 1.

six months he had individual therapy, and for the rest of the period group therapy, Dr. Owens being in charge of the latter activity for about one and a half years (Tr. 149).

At the trial Dr. Gordon was called on behalf of the defense and Dr. Owens appeared for the prosecution. Dr. Gordon testified it was a "very good possibility" that appellant suffered from prison psychosis which "occurs in people confined, as a result of the confinement" (Tr. 101–102). Appellant's symptoms ("delusions of persecution and hallucinations of the auditory and visual type. Fears") "sums up to this category" and is "Precipitated by the confinement" (Tr. 102). There was a "considerable possibility" that appellant had prison psychosis, possibly better than fifty percent probability (Tr. 105). Asked by the court if the psychosis could develop in the four days between arrest and examination, the doctor replied

> In a very short time, Your Honor. As a result of confinement. That means the very minute the patients find themselves locked up in jail, then his psychosis may already start (Tr. 108).

Dr. Owens testified that he was familiar with the diagnosis (undifferentiated psychosis) [4] incident to Dr. Gordon's examinations beginning November 25, 1954 (Tr. 145). Upon appellant's admission to Saint Elizabeths the doctor found evidence of psychosis, including "blocking, which was an inability to relate verbally his thoughts to the physicians examining".[5] In this connection Sergeant Charles A. Mackey, of the Sex Squad, testified that on the evening of appellant's arrest, November 24, 1954, he talked to him for several hours (Tr. 159). He observed appellant's reactions to questions and situations.

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[4] Dr. Gordon explained his "undifferentiated" diagnosis by stating appellant had much "variegated antisocial antecendents and a questionable accident that knocked him out", for which he "never was hospitalized" (Tr. 101, 105). Dr. Owens testified Saint Elizabeths had no history of injuries to appellant's head (Tr. 151).

[5] Dr. Owens testified: "There was evidence of hallucinatory and delusional experiences when he was admitted. There was blocking, which was an inability to relate verbally his thoughts to the physicians examining. He was extremely suspicious of others around him. His affect, or emotional tone, quality of his emotions were inappropriate" (Tr. 152–153).

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Appellant "acted normal". He was responsive, was oriented, and exhibited no irrational behavior (Tr. 160).

Dr. Owens testified that appellant "was a sociopathic personality and quite often such persons will become psychotic under stress, or stressful situations, such as confinement" (Tr. 145–146). The doctor felt a psychosis, similar in type to prison psychosis, had been present (Tr. 146, 153). It was the doctor's opinion that appellant's "severe mental illness, psychotic condition, occurred following his confinement" (Tr. 147–148).

Dr. Owens stated that he was able to arrive at an opinion as to appellant's mental condition as of the date of the crime, November 4, 1954, which was that he "was suffering from a sociopathic personality" (Tr. 144–145). This condition is a mental disease. Generally speaking sociopaths, according to the consensus of opinion, "are not as sick as psychotics" (Tr. 146). Describing appellant's case, the doctor stated:

> I think that he has had this mental illness or this sociopathic personality since he was a child, because, of the particular symptoms or behavior I described; such as getting in difficulties as a child, inability to adjust in the home or elsewhere, emigrating from place to place, being truant, constantly being in difficulties with the law. This all fits the pattern of a sociopathic personality and I feel this condition had existed since early childhood (Tr. 152).

The doctor testified that he did not think appellant's sociopathic personality bore any causal relation to the crimes he committed, stating "I feel that he was mentally ill but the crime was not caused by the illness" and that "his severe mental illness, psychotic condition, occurred following his confinement" (Tr. 148). Dr. Owens, while recognizing that the earlier an examination can be made the better (Tr. 155), stated

> My opinion is based mainly on everything about this individual that I was able to learn about him dating back to childhood, including what information that I could obtain from other physicians who had examined

him from family or relatives or from the patient himself (Tr. 154–155).

The defense put on two lay witnesses, Mrs. Sallie Sanders, a cousin (Tr. 114), and Andrew Porter, related to appellant by marriage (Tr. 72, 124). Mr. Porter testified he met appellant in 1953 (Tr. 121). At the time of appellant's arrest he had been working with Mr. Porter on a construction job for three months. Prior to his marriage in 1954 appellant had lived with the witness (Tr. 122). Mr. Porter stated appellant hid clothes under his mattress and was undependable when trusted with the construction company's truck (Tr. 123).

Mrs. Sanders stated that in 1954 she saw appellant often, nearly every day (Tr. 116, 119). She never saw him drinking, but heard that he drank (Tr. 119). The only "unusual" thing she noted in 1954 was that he stole her husband's shirts (Tr. 119). The witness also testified that she knew appellant since he was two. Orphaned early, he became a truant and law breaker (Tr. 114 *et seq.*).

Taking the stand, appellant remembered living with the Porters but professed not to recall selling Mrs. Davis' watch to them (Tr. 182). He stated he had no memory of the crime (Tr. 180) nor of his arrest (Tr. 183). At Saint Elizabeths, he testified, he gained insight as to his antisocial behavior (Tr. 174–180).

STATUTES INVOLVED

31 Stat. 1322 (1901), as amended, 22 D.C. CODE § 2801 (1951):

> Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years: *Provided*, That in any case of rape the jury may add to their verdict, if it be guilty, the words "with the death penalty," in which case the punishment shall be death by electrocution: *Provided further*, That if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section.

31 Stat. 1322 (1901), 22 D.C. Code § 2901 (1951):

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

I

It was not error for the court to submit to the jury the issue of appellant's mental condition as of the date of the crime.

II

The complainant's testimony that she had been raped and robbed was corroborated by many circumstances, including an immediate complaint to the police, the discovery of probative traces at the scene, and the subsequent recovery from appellant's possession of articles stolen from her.

ARGUMENT

I. There was no error in the charge

Appellant's first argument (Argument A, Br. 11–16) is that the trial court's charge, in its bearing on the defense of insanity, was erroneous. It is first urged there was no "basis whatever for instructing the jury that it must find whether a mental disease existed at the time the offenses were committed" (Br. 13).

In support of this argument appellant sums up the testimony of the defense psychiatrist as suggesting "an actively psychotic personality in November, 1954" (Br. 11). This disregards the thrust of Dr. Gordon's testimony, which was in terms of a high probability that mental illness entered the picture only after the crime. Dr. Gordon testified, as was seen in the counterstatement, it was probable that appellant suffered from prison psychosis attendant upon his incarcera-

tion after his arrest.[6] The long and careful study of Dr. Owens, starting at a time psychotic symptoms were still present, confirmed this.[7]

Appellant urges that "exactly the same conclusion" should be reached as in *Satterwhite* v. *United States*, 105 U.S. App. D.C. 398, 267 F. 2d 675 (D.C. Cir. 1959), that the record is "barren" of evidence of capacity as of the date of the crime (Br. 14–15). The *Satterwhite* case does not deal with jury instructions and is distinguishable on its facts. In *Satterwhite* there was indication in the record of odd behavior at the time the crime was committed and of irrational symptoms close to the date of the crime. Unlike the instant case, in *Satterwhite* a retrospectant opinion, relating to the time of the crime, had not been elicited from the prosecution's expert. The defense psychiatrist had found Satterwhite "seriously disturbed mentally", suffering from a psychosis shown to develop gradually. In the instant case there was unanimous expert evidence supporting a conclusion that the psychosis came after the crime.

Thus whether appellant was suffering from a psychosis on the date of the crime was a fact question for the jury. On familiar principles it was also for the jury ultimately to determine whether appellant's personality disorder was a disease or defect. See *Taylor* v. *United States*, 95 U.S. App. D.C. 373, 222 F. 2d 392, 404 (D.C. Cir. 1955) ("* * * it is for the jury * * * to decide whether a given diagnosis, if accepted, brings the case within the legal definition of insanity"); *Stewart* v. *United States*, 94 U.S. App. D.C. 293, 214 F. 2d 879, 882 (D.C. Cir. 1954). Further, unassigned error need not

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[6] For the purposes of this argument, says appellant, "we can dismiss the testimony of the lay witnesses * * * the single lay witness for the prosecution was a precinct detective who saw the appellant only at the time of the arrest" (Br. 12). Sergeant Mackey's testimony was important as he interviewed appellant before incarceration and noted none of the psychotic symptoms, such as impaired ability to answer questions, found by the doctors thereafter. Thus his testimony corroborated that of the experts as to prison psychosis. See Counterstatement.

[7] Appellant notices (Br. 11) that Dr. Owens first examined appellant some months after the crime. The persistence of psychotic symptoms gave the doctor an opportunity to study their nature and therefore this hiatus had little practical effect. See also Dr. Owens' testimony in this regard.

be reached where "no request was made for the enlargement" of an insanity instruction. *Bradley* v. *United States*, 102 U.S. App. D.C. 17, 249 F. 2d 922, 926 (D.C. Cir. 1957).

Appellant additionally claims (Br. 15) that, contrary to *Carter* v. *United States*, 102 U.S. App. D.C. 227, 252, F. 2d 608 (D.C. Cir. 1957), the court charged in such manner as to suggest an affirmative finding of insanity and causality was required rather than a reasonable doubt thereof. Immediately after the language objected to the trial court had this to say to the jury:

> Basically, of course, there is a presumption of sanity in all cases. Every person is presumed to be sane until the contrary appears. However, when there is some evidence of mental disorder, as here, then the presumption of sanity vanishes from the case and the burden is upon the government to prove beyond a reasonable doubt that at the time in question the defendant was of sound mind, or, if he suffered from a mental disease or defect, that the offense was not caused by the mental disease or defect, just as the burden is upon the government to prove all of the other elements of the offenses. (Tr. 228).

The trial judge had occasion to comment that this instruction was taken from the record in *Niport* v. *United States*, 263 F. 2d 901 (D.C. Cir. 1959), in which the court's charge was approved (Tr. 234).

Not only was the above instruction clear, but there were many other portions of the charge referring to reasonable doubt to which the jury were cross-referred by the judge (Tr. 218–19, 225, 229). While the charge need not be so supported, it is also noticed that the trial court permitted defense counsel to argue at length and most emphatically that the burden was on the Government (Tr. 195–196).

II. There was ample corroboration of Mrs. Davis' testimony that she had been raped

Appellant's second argument (Argument B, Br. 16–19) is that Mrs. Davis' testimony was insufficiently corroborated. A specific objection made (Br. 17) is that the complainant's testimony as to penetration "was not positive".

Appellant points out (Br. 17) that when the complainant's answer (that there had been sexual relations) was repeated by the prosecutor in the form of a question, Mrs. Davis answered "Yes, I guess" (Tr. 21). The prosecutor, however, immediately proceeded to other questions which assumed, in terms, that sexual relations had been accomplished. See note 1. There was no objection to these questions at all, much less on the basis that, in assuming an unqualified fact, they were not supported by Mrs. Davis' testimony. At argument on the motion for judgment of acquittal the defense made clear it did not consider the complainant had qualified her statement that there had been "sexual relations". Specific objection below was to the fact that Mrs. Davis had not used the term "penetration" [8] (Tr. 93). The defense summed up her testimony as follows: "She stated that she had sexual relations and, basically, that is the extent of her testimony" [9] (Tr. 92).

Especially where the defense does not claim consent, the delicacy attending inquiry as to penetration makes imperative that the defense should object, if necessary, to secure clarification of such language as Mrs. Davis employed. The absence of immediate objection to the subsequent questions propounded indicates that Mrs. Davis had intended unequivocally to convey to the jury that sexual relations had taken place. Nor was a different position taken by the defense at the argument for a judgment of acquittal. Language employed in describing penetration may not be taken out of context."

In any event, appellant's testimony as to penetration was amply supported by circumstances. Penetration itself may be

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[8] No "particular form of words" is required to describe penetration. State v. Bowman, 232 N.C. 374, 61 S.E. 2d 107, 108 (1950).

[9] A somewhat similar argument is made on appeal to the effect that it would be a "gratuitous assumption that sexual relations to this witness means actual penetration of her genitals by the male" (Br. 17). The hospital examination, if such data were needed in reference to a mother of three children, showed the complainant physically capable of marital introitus (Tr. 65). Thus appellant offends common sense when he assumes Mrs. Davis could have meant relations other than those involving penetration.

[10] Commonwealth v. Goldberg, 162 Pa. Super. 203, 57 A. 2d 167, 168 (1948).

shown by circumstantial evidence.[11] Here the indirect proof was most cogent. Appellant's animal tracks strongly indicated that he had pinned his victim to the ground and had carnal knowledge of her.[12] See note 3 and text.

Appellant's second argument continues that, putting the element of penetration aside, the other circumstances attending the crime insufficiently corroborated the complainant (Br. 18). This argument is supported by reference to cases,[13] including

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[11] People v. Haywood, 280 P. 2d 180, 181 (Cal. Dist. Ct. App. 1955).

[12] Appellant, however, concludes the "corroborating circumstances surrounding the act which tend to establish penetration were "palpably inconclusive and tenuous" (Br. 17). The seminal spot found at the scene "scarcely deserves any probative weight", according to the appellant (Br. 18). Pointing out that other substances may resemble semen, appellant omits reference to the toe marks, a few feet from the spot, which eliminate any doubt in this regard. See note 3 and text.

[13] *Kidwell* v. *United States*, 38 App. D.C. 566 (D.C. Cir. 1912) (a carnal knowledge case in which the complainant, 15, was incorrigible and had a bad reputation for veracity: surrounding circumstances must point to probable guilt or corroborate indirectly the testimony of the complainant); *Ewing* v. *United States*, 77 U.S. App. D.C. 14, 135 F. 2d 633 (D.C. Cir. 1942), *cert. denied*, 318 U.S. 776 (1943) (defendant knew the victim, a lady much younger than himself, and had access to the apartment in which she lived; had appellant urged consent at trial, rather than on appeal, "there was evidence which might have brought a verdict to this effect"; corroboration of a complainant need only be circumstantial); *Kelly* v. *United States*, 90 U.S. App. D.C. 125, 127, 194 F. 2d 150, 152 (D.C. Cir., 1952) (solicitation of a plain clothes officer for homosexual purposes: in view of the danger of blackmail court should require corroboration by provable surrounding circumstances); *Walker* v. *United States*, 96 U.S. App. D.C. 148, 223 F. 2d 613 (D.C. Cir. 1955) (rape complainant sufficiently corroborated by evidence at scene, absence of motive to charge falsely, appellant's evasiveness and glibness on the stand, etc.) (a dissent questioned identification after passage of time and failure to offer evidence as to mental and physical traces of the crime); *Fountain* v. *United States*, 96 U.S. App. D.C. 389, 236 F. 2d 684 (D.C. Cir. 1956) (conviction of assault with intent to rape an unqualified child reversed: a confession, insufficient as to rape, would have corroborated "indecent liberties", of which defendant was acquitted).

See also: *McGuinn* v. *United States*, 89 U.S. App. D.C. 197, 191 F. 2d 477 (D.C. Cir. 1951) (conviction of rape affirmed; corroborating circumstances: immediate complaint to the police as distinguished from 24 hours in *Ewing*; appellant found in condition described by complainant; accuser had no motive to lie, etc.); *McKenzie* v. *United States*, 75 U.S. App. D.C. 270, 126 F. 2d 533 (D.C. Cir. 1942) (capital conviction of rape and robbery; while corpus delicti was unquestionably established, identifying evidence was conflicting and court erred in commenting on this evidence; clothing and money stolen from a dry cleaning establishment, and a pistol used by the rapist were not found on defendant).

the *Kidwell* and *Ewing* cases, in which the rule of corroboration was recognized and clarified.

This Court has recognized [14] that when a comparison of different rape cases is attempted (Appellant's Br. 18–20) purely fortuitous circumstances, corroborative in their tendency, or the reverse, are to be encountered. For example where the victim and her assailant are acquainted, identity of the defendant is unassailable but lack of consent may well be questioned. Conversely, the identification of a rapist-robber may be doubtful, while the corpus delicti, forcible carnal knowledge, is unquestionably made out.[15]

Appellant does not claim any positive indication of consent, and the record indicates that appellant was most clearly identified by the direct testimony of Mrs. Davis and also circumstantially by his demonstrated possession of the victim's property, the watch and lighter. Possession of such articles, after rape and robbery, is cogent evidence of identity. See *McKenzie* v. *United States*, 75 U.S. App. D.C. 270, 272, 126 F. 2d 533 (D.C. Cir. 1942).

To satisfy the rule that there must be more than the testimony of a rape complainant to warrant conviction, it is only necessary to show circumstances which "corroborate indirectly the testimony of the prosecutrix." *Kidwell* v. *United States*, 38 App. D.C. 566, 573 (D.C. Cir. 1912). The *Ewing* case recognizes that even where the circumstances relied on conflict with others, the former do not ordinarily lose their corroborative force. *Id.* at 17. The *Ewing* case should apply more strongly where, as here, there is a complete absence of any internal conflict, but a mere attempt to show the absence of fortuitous circumstances found in other cases. See note 13 and text.

Prime corroboration exists, according to the *Kidwell* case, where the "circumstances surrounding the parties at the time were such as to point to the probable guilt of the accused". *Id.* at 573. This standard was amply met in the instant case. The complainant, a reputable matron, was accosted at night on

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[14] Ewing v. United States, *supra* at 16 n. 1.

[15] *Compare* Ewing v. United States, *with* McKenzie v. United States, *supra* note 13.

a deserted street and forced up an alley where she was robbed and raped. Mrs. Davis came to the back yard, where she was ultimately set upon, through constant threats of bodily harm, warnings not to cry out, and the use of a hard object which she thought to be a concealed pistol. The appellant described the concealed object as a weapon with the words "This is a stick up". Other physical force was used by appellant, a much bigger and stronger person than his victim.[16]

The fact that the parties were strangers, and the concession by appellant that the corroborating circumstances "might be consistent with robbery" (Br. 18) or "convincing as to robbery" (Br. 10), indicate clearly that Mrs. Davis had no motive to accuse appellant falsely, which is a significant corroborating circumstance.[17] The same evidence demonstrates that force was established and corroborated, for the force was obviously common to both the rape and robbery.[18] Thus the *Ewing* standard was amply met.

> * * * it is generally settled now that consent is not shown when the evidence discloses resistance is overcome by threats which put the woman in fear of death or grave bodily harm, or by these combined with some degree of physical force. *Id.* at 16.

---

[16] The "relative size and strength of the parties" is an important consideration. Weir v. State, 236 S.W. 2d 150 (Tex. Crim. 1950).

[17] McGuinn v. United States; Walter v. United States, *supra*.

[18] Appellant states (Br. 18) there was no "evidence of force at the scene except as consistent with *pursesnatching*" (emphasis supplied). The robbery statute does punish not only robbery by force, but also creates purely statutory varieties not involving "putting in fear". As enacted, rape and robbery are set forth in a subchapter of the Code entitled "Offenses Against the Person" as distinguished from "Offenses Against Property". 31 Stat. 1321 (1901). Here the robbery was of the common law type. The scene of this crime was a backyard in a dark alley, not a place conducive, under the circumstances, to "sudden * * * seizures or snatching".

Appellant was later identified as a common law robber by his possession of individual articles of the appellant which he selectively took from her person.

In addition to the many corroborating circumstances referred to directly or incidentally above, it is to be noted that an immediate report of the crimes was made to the police.[19]

Accompanying appellant's argument is a reiteration of the proposition that it is incumbent upon the Government "to erase the possibility of a reasonable doubt" (Br. 10, 17). The applicable rule is that only substantial evidence is necessary to justify submission of a rape case to the jury, a requirement more than satisfied here. Exposition of the rule in terms of "reasonable doubt" means only that a judgment of acquittal should be directed when such a doubt must be necessarily and universally entertained by jurors. *Farrar* v. *United States*, D.C. Cir. No. 15223, Dec. 11, 1959 (slip opinion (majority) p. 4).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

OLIVER GASCH,
United States Attorney.
CARL W. BELCHER,
JOHN D. LANE,
Assistant United States Attorneys.

[19] This is contrast to the twenty-four hours which elapsed in *Ewing*. See also the comment on this point in *McGuinn* v. *United States*, *supra* at 196. Appellant sets the time in *Ewing* as 12 hours, which was not the time of complaint to the police, but to friends. *Id.* at 17.

U.S. GOVERNMENT PRINTING OFFICE: 1959

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,277

DAVID DUKES,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

852

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit
FILED JAN - 5 1960
Joseph W. Stewart
CLERK

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JOINT APPENDIX

[Filed in Open Court, Dec. 28, 1954]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled December 2, 1954, Sworn in on December 7, 1954

The United States of America	:	Criminal No. 1272-'54
v.	:	Grand Jury No. 1248-54 1249-54
David Dukes	:	
	:	Robbery
	:	Rape
	:	(22 D.C.C. 2901, 2801)

The Grand Jury charges:

On or about November 4, 1954, within the District of Columbia, David Dukes, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Ruth L. Davis property of Ruth L. Davis, of the value of about $41.00, consisting of the following: one wristwatch, of the value of $40.00, and one cigarette lighter, of the value of $1.00.

SECOND COUNT:

On or about November 4, 1954, within the District of Columbia, David Dukes had carnal knowledge of a female named Ruth L. Davis forcibly and against her will.

/s/ Leo A. Rover
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:
/s/ Bernard J. Maguire
Foreman.

[Filed Jan. 7, 1955]

PLEA OF DEFENDANT

On this 7th day of January, 1955, the defendant David Dukes, appearing in proper person and by his attorney George A. Parker, Esq., being arraigned in open Court upon the indictment, the indictment being stated to him, pleads Not Guilty thereto.

The defendant is remanded to the District Jail.

The defendant is granted 30 days to file appropriate motions.

By direction of

Charles F. McLaughlin
Presiding Judge
Criminal Court #1

HARRY M. HULL, Clerk

By /s/ William Collins, Jr.
Deputy Clerk

* * *

[Filed Jan. 19, 1955]

MOTION OF THE UNITED STATES ATTORNEY FOR A JUDICIAL DETERMINATION OF THE MENTAL COMPETENCY OF THE DEFENDANT

Leo A. Rover, United States Attorney in and for the District of Columbia, respectfully represents unto this Honorable Court as follows:

The above named defendant, David Dukes, was indicted in this District on charges of violating Title 22, District of Columbia Code, Sections 501, 2801, 2901, 3501a, and 3502; that pending trial, it became apparent that the said defendant was of unsound mind; that the said defendant was examined by psychiatrists to determine the defendant's mental condition; that it now appears from the reports and affidavits of Drs. Gerhart J. Gordon and Amino Perretti, psychiatrists attached to the staff of District of Columbia General Hospital, that the defendant is presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly assist in his own defense. The said affidavits of Drs. Gerhart J. Gordon and Amino Perretti are attached hereto and made a part thereof.

WHEREFORE, the premises considered, the said United States Attorney respectfully prays that this Honorable Court judicially determine the mental competency of the defendant, as provided by Section 4244, Title 18, United States Code.

/s/ Leo A. Rover
United States Attorney

/s/ Harold H. Titus Jr.
Assistant United States Attorney

[Certificate of Service]

[Filed Feb. 18, 1955]

ORDER COMMITTING DEFENDANT

This cause having come on for hearing pursuant to Section 4244, Title 18, United States Code, and evidence having been adduced in open Court, the Court finds that the defendant, David Dukes, is presently insane and so mentally incompetent as to be unable to understand the proceedings against him, or properly to assist in his own defense, it is by the Court, this 18th day of February, 1955,

ORDERED, that the defendant, David Dukes, be committed to the custody of the Attorney General or his authorized representative until he is mentally competent to stand trial, or until the pending charges against him are disposed of according to law.

/s/ H. A. Schweinhaut
Judge

[Filed Feb. 27, 1959]

ORDER

This matter came on before the Court on the defendant's motion to determine his mental competency to stand trial; whereupon after hearing testimony and argument adduced in open court, and the Court finding that the defendant is presently competent to stand trial in that he understands the nature of the criminal charges now pending against him and he is able properly to assist counsel in his own defense, it is by the Court this 27 day of February, 1959,

ORDERED, that the United States Marshal for the District of Columbia, or one of his deputies, is hereby directed to transport the said David Dukes to the District of Columbia Jail to await trial in the above-entitled criminal actions.

/s/ Edward M. Curran
JUDGE

Executed by transferring
David Dukes CR 1271-2-3-54
From St. Eliz. Hosp. to D. C. Jail
2-27-59

/s/ Joseph H. Wasselewski

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 Washington, D. C.

Thursday, June 25, 1959

The above-entitled cause came on for trial before THE HONORABLE EDWARD A. TAMM, a U. S. District Judge, at 11:15 a.m.

* * * * *

13 RUTH LYDIA DAVIS

was called as a witness by the Government, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

Q. Mrs. Davis, I am going to be asking you questions, so hold your voice up, so we can hear you. Tell us your full name, please.
A. Ruth Lydia Davis.

THE COURT: Ruth what?

THE WITNESS: Ruth Lydia Davis.

BY MR. TITUS:

Q. Talk right into that microphone, Mrs. Davis. What is your home address? A. 4307 G Street, Southeast.

Q. And, is it Mrs.? A. Mrs., yes.

Q. And, Mrs. Davis, you live at that address with your husband and children? A. Yes.

Q. How many children have you? A. Three.

14 Q. Three children. Mrs. Davis, on November 4, 1954, where were you and your husband and family living at that time? A. 220 Lowrie Place, Northeast.

Q. Is that L-o-w-r-i-e? A. Yes.

Q. And, Mrs. Davis, do you have a sister? A. Yes.

Q. What is your sister's name? A. Helen Burney.

Q. Helen Burney? A. Yes.

Q. Is that B-u-r-n-e-y? A. Yes, I think so.

Q. And, Mrs. Davis, on the date of November 4, 1954, where was your sister living at that time? A. Fifteenth Street, Northwest. I don't know the address. I don't know the address.

Q. Do you remember what the address was, was it 15th or 13th or what? A. Well -- I don't know. It was some -- I think it was between 13th and 14th. I don't know exactly what street. I have forgotten it.

Q. Do you remember what section of Washington it was in, Mrs.

15 Davis? A. Northwest.

Q. Northwest section? A. Northwest.

Q. All right. And what was your sister's name at that time, back in 1954? A. Helen Stokes.

Q. Helen Stokes? A. Stokes.

Q. Now, Mrs. Davis, I want to direct your attention to the evening of November 3, 1954. Did you have occasion to leave your home on that particular night and go any place? A. Yes.

Q. Where was your husband at the time you left home, Mrs. Davis? A. He was at work.

Q. Where did he work at that time? A. Naval Research Laboratory.

Q. Naval Research Lab? A. Yes.

Q. And what were his hours of work at that time on that particular evening? A. Four until 11:30 or 12:00, I think.

Q. Four until 11:30 or 12? A. Yes.

16 Q. Is that four in the afternoon? A. Yes.

Q. And when you left home on that particular evening of November

3, 1954, who remained with your children? A. My nephew.

Q. Your nephew? A. Yes.

Q. And how many children did you have at that time? A. Three.

Q. Three. Mrs. Davis, where did you go when you left home that night? A. I went over to my sister's house.

Q. To your sister's house? A. Yes.

Q. Is that Helen Stokes? A. Yes.

Q. About what time would you estimate it to be that you arrived at your sister's house? A. Oh, around ten or sometime around there.

Q. Around 10:00 p.m.? A. Yes.

Q. And when you arrived at her house, was there anyone there besides your sister? A. Yes.

Q. Who were they? Do you know who the people were? A. It was

17 a girl friend of my sister's, and two men. I don't know who they were.

Q. Were they friends of your sister's? A. Yes.

Q. How long did you remain at your sister's house on that particular evening of November 3, until about what time? A. A little before 12:00, I think.

Q. And a little before 12:00, what did you decide to do then? A. Go home.

Q. And go to your home? A. Yes.

Q. And what did you do when you made that decision to go home? Tell us what happened. A. Well, I walked up, I think it was 13th or 14th Street, I don't know exactly what street, and turned the corner.

Q. Turned the corner? A. Yes. And I think that was Otis Street, if I am not mistaken. I am not too sure.

Q. All right. You turned on Otis Street? A. Yes.

Q. Where were you heading when you turned on Otis Street? A. Well, I was heading, I was going to a bus stop, a street car stop a block down, because my sister said it was easier to catch a street car there than it was to catch a cab up that way than it was to catch one on

18 14th Street, I think it was.

Q. All right. You were going to catch a cab. A. Yes.

Q. Now, when you turned on Otis Street what, if anything, happened to you when you made that turn on that street? A. Well, this man walked up behind me and I turned around to look and I slowed down. He was walking fast and I slowed down to let him go by because I don't like anybody to walk in back of me.

Q. Did he say anything at that time? A. He said, "Hey, lady, what street is this?"

Q. What street was he referring to, if you know? A. Fourteenth Street.

Q. All right. What did you say? A. And I told him it was 14th Street.

Q. All right. A. And he said, "What is the next street up?" And I told him it was, I think it was 15th or 13th or something like that.

Q. All right. What happened then? A. And he started toward me and came up -- he stepped back and he pushed something in my side and it felt like a gun and I don't know, it was some kind of an object, hard object, and felt exactly like a gun.

19 Q. What did he say then? A. He told me to keep quiet, "This is a stick-up."

Q. Now, at that time was there anyone else on the street?

A. There was no one on the street.

Q. What did he do after he put this object in your side and said, "Be quiet. This is a stick-up?" What happened then? A. He asked me did I have any money and I told him no and he called me a liar and he told me to walk down further toward the alley and he told me to go through the alley, and I walked through the alley and he still had this object in my side and everytime I would start to say something or open my mouth, he just pressed it in my side and said, "Be quiet and you won't get hurt."

Q. Now, were you carrying a purse? A. Yes.

Q. What, if anything, happened when you got into the alley with this man? A. Well, he took my pocketbook and searched it, and as I

remember, he told me to walk on. He told me to walk further down the alley and up into this yard, and he told me did I have anything, was I sure I had any money and I told him no, I didn't have any money, I told him no, I didn't have any, and he said, he called me a liar again and told me to lay on the ground and I told him no.

20 Q. What did he do then? A. And I have forgotten so much. It's been so long.

Q. Now, let me ask you this. What did you do with your purse? Where was your purse at that time? A. I am not sure whether he gave it back to me or whether he kept it under his arm all the time, he had it under his arm, holding it, and sticking this object in my side all the time.

Q. When you got to this place where I think you said he told you to lie down, is that correct? A. Yes.

Q. What did you do then? A. I told him no, and he said, "Well, I am going to get something out of this."

And he told me to take off my pants and I told him no, and he just kept pressing this object in my side and told me, "You won't get hurt,"

And I started to open my mouth to say something and every time I would open my mouth to say something, he would just press this object in my side. I thought it was probably a gun and was just scared.

Q. You were scared? A. Yes.

Q. What did you do then? What did he do? A. Well, he told me to take my pants off and I told him no, and he pushed me back on the

21 steps and I took them, took them down. I didn't take them all the way off.

Q. What did he do then? A. Well, he had sexual relations with me then.

Q. He had sexual relations with you? A. Yes, I guess.

Q. Now, where was, after that was over, where was your purse? If you know? A. I think he laid it on the steps.

Q. All right. A. If I am not mistaken.

Q. What did he do then after he had completed his sexual relations?

A. We got back up and he told me to put my pants back on and all of this time he still, he had his hand in his pocket with this object pushing against my side.

And he took my pocketbook and put it in between his arm and side, held it with his elbow like and went through it.

Q. He went through it? What happened? A. He dropped something on the ground.

Q. What was it that he dropped on the ground? A. A cigarette lighter and something else.

Q. All right. What, if anything, did he do with the cigarette lighter, if you know? A. He picked the cigarette lighter up and put it in his pocket.

22 And he asked me, did I have a watch. And I don't know whether I said yes or no. Anyhow, he grabbed my arm and told me to take it off and I took it off and he took that from me and put that in his pocket, too.

Q. The watch? A. Yes.

MR. TITUS: If Your Honor please, may the lighter be marked as Government Exhibit No. 1 for identification and the watch as Government Exhibit No. 2 for identification?

THE COURT: The Clerk will so mark the exhibits.

(Cigarette lighter and watch were marked as Government's Exhibits Nos. 1 and 2, respectively, for identification.)

MR. TITUS: Would Your Honor indulge me a moment?

THE COURT: Yes.

BY MR. TITUS:

Q. Mrs. Davis, I want you first to look at what has been marked as Government Exhibit No. 1 for identification, a lighter with a blue case. Would you look at that and examine it and tell the Court and jury whether you have ever seen that lighter before. A. Yes.

Q. Where -- was that the lighter that you have just described?

23 A. Yes, it is.

Q. Is that the lighter that the person or man in this alley picked up and put in his pocket? A. Yes --

Q. I can't hear you. A. Yes, it looks like the same one.

Q. Now, incidentally, Mrs. Davis, had you ever seen that particular man who took you in this alley, before that evening? A. No, I haven't.

Q. Are you able to identify that man now? A. Yes.

Q. Do you see him here in the courtroom? A. Yes.

Q. Would you indicate where he is. A. Over there.

Q. Would you describe him. A. Gray suit, gray coat and a white shirt.

MR. TITUS: Your Honor, I think by her description she has indicated the defendant in this case.

THE COURT: The witness may step down and point to the defendant.

MR. TITUS: Would you step down and point to the man that you just described.

24 THE WITNESS: The one in the middle.

MR. TITUS: Go right over there.

(Witness goes over to table.)

THE WITNESS: Right here.

MR. TITUS: Describe him.

THE WITNESS: Checkered tie.

MR. TITUS: The checkered tie?

THE WITNESS: Yes.

THE COURT: The record will indicate that the witness has identified the defendant.

BY MR. TITUS:

Q. Mrs. Davis, I want you to look at what has been marked as Government Exhibit No. 2 for identification, a watch. Examine it closely, the face of the watch, and tell the Court and jury whether you have ever seen that watch before. A. Yes.

Q. What watch is that? A. This is my watch.

Q. Is that the watch that was on your wrist on that particular night? A. Yes, it is.

Q. Is that the watch that was picked up by the defendant and put in his pocket? A. Yes, it is.

25 Q. Now, did there come a time when the defendant handed back to you your purse? A. Yes.

Q. Before he handed it back to you, what happened? A. Before he handed it back to me, he wiped off everything in the purse.

Q. With what? A. With a handkerchief. He took everything one by one out of the pocketbook and just held it and in his arm, underneath his arm, and just took everything out and just wiped it off, wiped the pocketbook off and --

Q. With a handkerchief? A. With a handkerchief and put it back in.

Q. Then put it back in. Did he hand the purse to you? A. Yes, he did.

Q. After that happened, when he handed the purse back to you, what did you and the defendant do then? A. He asked me where I was going from there and I told him I was going back to my sister's house.

And he told me, "No, I know you are not. You are going home."

And I told him I had to go back to my sister's house to clean up or something. I don't remember too well.

And then he said, asked me how many people were there. Were

26 there any men in the house. And I told him yes. I told him no at first, and he pushed this object. He still had whatever it was in his pocket. Pushed it in my side all the time.

Q. All right. What did you do then after? A. And I told him yes. And he asked me how many men and I told him two or three. I am not too sure .

Q. What happened then? A. And he told me to walk out to the street and I -- he asked me was I going to call the police and I told him no.

Q. Did you walk out to the street? A. Yes, I did.

Q. And where did he go when you walked out to the street? A. He told me not to holler or anything, and I won't get hurt, and all the time

he kept saying that, "Be quiet and you won't get hurt."

Q. All right. When you walked out to the street, where did the defendant go? A. He walked fast, the same way he came from, I think it was 14th Street. He walked down and I went in my sister's house and told her about it and she called the police.

Q. She called the police? A. Yes.

Q. Did there come a time when the police arrived at your sister's
27 house? After they were called? A. Yes.

Q. Did you go anywhere with the officers that arrived after they were called? A. Yes. I went back to the scene. I showed them where this rape took place.

Q. You showed them where it took place? A. Yes.

Q. Did you find anything in the alley when you went back with the officers, if you remember. A. Not in the alley, in the yard.

Q. What did you find in the yard? A. It was a comb.

Q. All right. Was that your comb? A. Yes, it was.

Q. Where had that comb been when you first went into the alley with the defendant? A. Been in my pocketbook.

Q. In your pocketbook? A. Yes.

Q. Was that one of the objects that dropped to the ground that you talked about? A. Yes, it was.

Q. Incidentally, Mrs. Davis, did you have any money, bills of any kind, in your wallet or in your pocketbook on that particular night?
28 A. I didn't have any money in my pocketbook, but I did have something in my dress pocket.

Q. In your dress pocket? A. Yes.

Q. Was that change or was that bills? A. I think it was -- it was bills, it was about three bills.

Q. About three bills? Did you have any change that you recall in your pocketbook or wallet? A. Yes, I did. I had, I think it was just about carfare or something like that.

Q. Carfare? A. Yes.

Q. This alley that you say you were taken into by the defendant,

Mrs. Davis, can you recall where that alley was in relation to the houses, for instance, where your sister lived? A. I think it was just about two or three doors from there. I ask -- it could have been about that distance, but I wasn't sure.

Q. Was it in the back of those houses? A. Yes, it was in the back.

Q. Had you ever been inside your sister's home before that particular night, Mrs. Davis? A. No, I haven't.

29 Q. Had you and your husband ever had occasion to be at that particular house on any prior occasion? A. I think we drove her home one night.

Q. Drove her home? A. But we had never been inside of her home.

Q. Never been inside the house? A. No.

Q. And your home, you said, was in Northeast Washington at that time? A. Yes.

Q. And her place was Northwest Washington? A. Yes.

Q. Mrs. Davis, how old are you? A. Thirty-five.

Q. And how old is your oldest child? A. Eleven.

Q. And how long have you been married? A. Thirteen, fourteen years, fourteen years.

Q. Fourteen years? A. Fourteen years, I think. Thirteen or fourteen, I can't remember.

Q. Is your husband still employed at the Naval Research Laboratory? A. Yes.

30 Q. He is? A. Yes.

Q. Do you work, or do you just take care of your family and children? A. Well, I worked up until two weeks ago.

Q. You did work? A. Yes.

Q. Where was that? A. At Division Avenue Drugs.

Q. Drugs? A. Yes.

Q. Drug store? A. Drug store.

Q. When you went back in this alley with the police officer, Mrs.

Davis, after they responded, did you show them the place, the actual physical scene or where this alleged rape occurred? A. Yes, I did.

Q. Was there anything there that you saw which was obvious to the officers when you went back? A. Yes.

Q. What was that, Mrs. Davis? A. Well, it was a wet spot on the steps.

Q. Wet spot on the steps? A. Yes.

31 Q. Is that where the incident occurred to you? A. Yes, it was.

Q. Now, Mrs. Davis, after the police had gone back into this alley with you, did there come an occasion when you went to a hospital? A. Yes.

Q. Do you know what hospital you went to, Mrs. Davis, that particular morning? A. D. C. General.

Q. D. C. General. Do you know if they examined you there? A. Yes.

Q. And do you remember how long you remained there at the hospital? Approximately? A. Oh, about, I don't know for sure, about a half hour, maybe.

THE COURT: Keep your voice up.

THE WITNESS: About 15 minutes to a half hour, I guess, something like that.

BY MR. TITUS:

Q. All right.

MR. TITUS: Your witness.

CROSS EXAMINATION

BY MR. ROBINSON:

Q. Mrs. Davis, now when was it that you arrived at your sister's

32 home? A. Around 10:00 o'clock.

Q. You were there about two hours? A. Yes.

Q. What, if anything, did you do while you were there? A. Oh, my sister played some records and we danced and that's about all.

Q. Do you mean you danced with the people who were present at the house when you arrived? A. No, not -- I didn't dance with the

people. I did dance with one, with one of the gentlemen who was there, and I didn't dance any more, just --

Q. Did you go there by yourself? A. Yes, I did.

Q. And you left alone? A. What was that?

Q. And you left alone? A. Yes, I did.

Q. I believe you testified to the fact that from time to time a hard object was pressed into your back. Did you at any time see that object? A. No, I didn't.

Q. During the time you were talking with the defendant and while you were going through the alley and on the street, did you at any time call out? A. No, I didn't.

33 Q. Did you at any time raise your voice? A. At one time I did, in fact quite a number of times, I started to open my mouth and he had his hand in his pocket with this hard object pressing up against my side, which I thought was a gun.

And he kept saying, "Be quiet or you won't get hurt," so I was quiet. I was scared.

Q. Did you at any time push, frighten, or use your hands on this person during the time you were in the alley? A. Yes, I tried to push him back a number of times and each time he just pushed this object in my side, each time.

Q. Approximately how long after you left your sister's house did you meet the person on, I believe, 13th Street? A. About -- would you repeat that?

Q. How long was it after you left your sister's house before you met the person on 13th Street, approximately? A. About how long was it, I mean --

Q. Yes. A. Well, I don't know exactly how long it was. It could have been about a half an hour or 45 minutes or something like that. I don't know for sure.

THE COURT: I don't think the witness understood your question, Mr. Robinson.

34 BY MR. ROBINSON:

Q. I mean from the time you left your sister's house, and as you have already testified, walked down the street, and you stated that someone called you, "Hey, lady." Now how long was that time? A. Oh. That couldn't have been any longer than about two or three minutes, I guess. No longer.

Q. And could you approximate the time you were in the alley? A. Well, that is what I did just before. I thought that you were talking about. Forty-five minutes or something like that.

Q. I believe you testified that when you reached 13th Street again you went back to your sister's home, is that correct? A. After this, yes.

Q. And did you call the police or did someone else call them? A. My sister called the police.

Q. Do you know how long -- well, did you talk with her immediately after you returned to the house? A. Yes, I did.

Q. Do you recall how long it was before she called the police? A. About five minutes.

35 Q. When was it that you went to the D. C. General Hospital? A. As soon as I took the policemen around to the side alley and showed them where this thing took place.

Then they took me down to the station first. I don't know what station it was and from there I waited for a while and they took me over to D. C. General, and they took me home.

After D. C. General they took me home, no back down to the station and I don't remember too much about that.

Q. Now, I believe, Mrs. Davis, that you testified when you arrived at your sister's house there were three or four people present, is that correct? A. Yes.

Q. Now, were those same people there when you left? A. Well that -- when I returned to my sister's house I was excited and --

THE COURT: No. No. Just listen to the question. Just answer the question. Read the question, Madam Reporter.

(Whereupon, the pending question was read by the reporter.)

THE WITNESS: Well, I think some of them -- yes, I think they were there. I think they were.

BY MR. ROBINSON:

Q. Do you recall whether or not any of them had left the house
36 before you did? A. I don't know. No. No one left the house before I did.

Q. I believe you also testified that there were at least two other men present that you did not know. A. Yes.

Q. Were they still there? A. Yes, I think they were.

Q. Now, can you recall whether or not after you left your sister's house, whether anyone followed you? A. No, definitely no one followed me as I know of, except this man here.

Q. Well, after you left your sister's house and walked down the street, do you ever recall turning back to look? A. Yes, I did turn back to look when this, when this man said,"Hey, lady. What street is this?"

Q. Had you looked prior to that? A. What did you say?

Q. Had you looked back before then? A. Yes, because I heard someone coming behind me.

Q. Do you recall whether any other persons were on the street at the time? A. I don't recall that there was anyone on the street at the time. No one at all.

Q. While you were standing in the alley, did you see any other
37 persons on the street? A. No.

Q. Did you see anyone in the alley? A. No, only this -- person.

Q. Do you recall whether or not there were people in the house, present in the house I believe you testified you were in the back of? A. Well, the house was dark and I don't know whether anyone was in there at first or not, but at one time I did see a light turn on, but it turned off again, so I don't know whether anyone was still in there or not. I don't know. I mean, I didn't have a chance to look around. He wouldn't even let me turn around or move hardly.

Q. Then, your answer is that you didn't see anyone in the house?

A. No, I didn't.

Q. Now, was there a street light at the alley entrance? A. It was a street light, I don't think it was right at the entrance, but it was near, pretty near the entrance of the alley, and could see pretty clear.

Q. How far away were you from it? A. I don't -- I can't say how far away. I just don't --

Q. Would it be as far as from where you are sitting? A. Yes, maybe a little further, but not too far.

38 Q. The alley dark? A. No, it wasn't very dark. The light from the alley. In fact I could see his face in the alley so it couldn't have been so dark.

Q. Do you recall what type of clothing this person who took you into the alley was wearing that evening? A. Yes. He had on a gray suit.

Q. Anything else? A. Well, I don't remember exactly anything else, but I know he had on a gray suit, at that time. I do recall a gray suit.

Q. Do you recall whether he was wearing a necktie? A. I don't remember. I don't remember whether he did or not.

Q. Did there ever come a time when you were confronted by a person and asked to identify them, after that evening? A. Yes.

Q. And where was that? A. That was down in the, I think it was the District Building, or the Court, I don't know where -- I think it was the District Building.

Q. Do you remember now when this was, what date? A. No, I don't remember the date.

Q. Was it sometime after? A. Yes, it was sometime afterwards and there was a line-up and I did identify this man.

39 Q. Well, now, how many were in the line-up? A. I don't know how many, but it was quite a few.

Q. A few other questions, Mrs. Davis. I recall that you testified you went to your sister's house and several other people were present and I believe you stated that at least two or three of them were men, is that correct? A. Two or three others were at the hearing?

Q. At your sister's house.

MR. TITUS: Your Honor, my only thought is that Mr. Robinson's voice is a little low. I don't think the witness heard the question.

THE COURT: Repeat your question. Keep your voice up.

BY MR. ROBINSON:

Q. I believe you testified that when you went to your sister's house there were several other people present, is that correct? A. Yes.

Q. And at least two of them were men, is that also correct? A. Yes.

Q. And you did not know any of them -- A. No.

Q. Prior to that time? A. No, I didn't.

40 Q. I believe I also asked you what, if anything, did you do while you were at your sister's house.

THE COURT: You have asked this question, Mr. Robinson.

BY MR. ROBINSON:

Q. Was there a party going on there? A. Well, I wouldn't call it a party because -- well, maybe you would. It was more than one, or two persons, so I guess maybe you would call it a party. But I wouldn't myself not say party.

Q. You were dancing there. Was there anything to drink? A. I don't know. I think there was a bottle of Scotch but I -- no one was drinking. I don't recall anyone drinking and I don't drink myself, so I don't recall anyone drinking anything. I believe I did -- I don't drink anything. I did drink a half a can of beer. I think it was, if I can remember, I think it was just that. But no one else was drinking anything else.

Q. Do you mean by your answer that no one drank while you were present, is that correct? A. I don't remember whether anyone did. I don't remember whether anyone was drinking at all when I was present, but I was offered something to drink and I refused and they insisted on --

41 THE COURT: Just a minute. Ask your next question.

BY MR. ROBINSON:

Q. Could you tell us whether or not any of the persons present had been drinking before you arrived?

THE COURT: I don't think --

THE WITNESS: Well, I --

THE COURT: Just a minute. I don't think the witness could testify as to what happened before she got there, Mr. Robinson.

MR. ROBINSON: Well, possibly not, but there could be indications that someone had been perhaps been drinking before she arrived, that's the extent of my question.

THE COURT: You may rephrase your question.

BY MR. ROBINSON:

Q. You testified in response to a question by the Government that you thought there was a gun pressed against your side from time to time, is that correct? A. Yes.

Q. And what made you think it was a gun? A. It felt like it might be a gun. I wouldn't know and I didn't question it because he was a big man and --

Q. Please just answer the question. You don't know whether it was a gun or not? A. No, I don't.

Q. Now, was this object pressed against your side continuously?

42 A. Most of the time it was.

Q. By that answer, do you mean from the time you went down to the alley into the yard, and back out? A. Yes, it was.

Q. And did the person with whom you were walking down the alley have only one hand free during all this time? A. Yes, he did. He had one hand in his pocket and he had hold of my one arm. He had a hold of me with the other arm.

MR. ROBINSON: No further questions, Your Honor.

THE COURT: Any further questions, Mr. Titus?

MR. TITUS: That is all, Your Honor.

THE COURT: You may step down.

(The witness left the stand.)

THE COURT: We are going to take a short recess, ladies and gentlemen of the jury. You should not discuss the facts in the case with anyone, not even your associates on the jury, during the recess.

(Whereupon, a short recess was taken by the Court.)

Whereupon,

HELEN CHRISTIAN BURNEY

was called as a witness by the Government, and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

43 BY MR. TITUS:

Q. Mrs. Burney, talk right into that microphone, sit back in the chair, if you would, and tell us your full name. A. Helen Christian Burney. Christian - t-i-a-n.

Q. Now, Mrs. Burney -- A. Yes.

Q. How do you spell your last name? A. B-u-r-n-e-y.

Q. And where do you live, Mrs. Burney, where is your home address? A. 5014, the letter "H" Street.

Q. Talk right into that. A. 5014, the letter "H" Street, Southeast.

Q. Now, Mrs. Burney, on November 4, 1954, where were you living at that time? A. On 13th Street. I don't remember the number.

THE COURT: Keep your voice up.

THE WITNESS: 13th between Spring Road and a short side street, I don't recall the name.

BY MR. TITUS:

Q. Mrs. Burney, do you see that thing in front of you there? A. Yes.

Q. Lean right into that and talk so that we can hear you. You don't remember the exact address, but it was on 13th Street? A. Yes.

44 Q. Was that in Northwest Washington? A. Northwest Washington.

Q. What was your last name, at that time? A. Helen Stokes.

Q. Stokes? A. Yes.

Q. Now, Mrs. Burney, you are the sister, are you, of Ruth L. Davis? A. I am.

Q. Incidentally, have you been ill recently? A. Yes.

Q. Are you ill at the present time? A. Slightly.

Q. Slightly. A. You might say.

Q. All right. Mrs. Burney, on the date of November 4, or November 3, 1954, did you have occasion to see your sister Ruth Davis on that particular evening? A. I did.

Q. What time did you first see her that evening? A. Estimating about 8:00 o'clock or between 8:00 and 9:00.

Q. Between 8:00 and 9:00. Do you remember where you first saw her that night, Mrs. Burney? A. In my house.

45 Q. At your house? Was there anyone else at your house when your sister arrived, if you remember? A. Yes.

Q. Who was there at your house? A. Lillian Morton, and her friend Calvin, I don't recall his last name.

Q. Speak louder. A. And her boy friend named Calvin. I just met him that night and I don't know his last name.

Q. Anyone else there? A. Joe. He is the boy friend of my girl friend Mary. Her last name is White.

Q. Mary White. A. And an elderly man, I think he was a co-worker of Joe's.

Q. A co-worker of this man Joe? A. He may be just a friend. I am not sure. I think he was a co-worker.

Q. All right. A. I am not sure.

Q. Anybody else there? A. No.

Q. Now, when your sister arrived at your house, Ruth Davis arrived at your house, how long did she stay there before there came a

46 time that she left? A. About three hours and a half or four.

Q. Do you remember what time it was that she left, Mrs. Burney, approximately? A. About 11:30 p.m.

Q. About 11:30? When she left your house, do you know where she was proceeding or going at that time? A. Home.

Q. What? A. Home.

Q. Do you know how she was going to get home? A. On the street car or catch a cab, I don't know how.

Q. Street car or catch a cab? A. Yes.

Q. When she left your house, Mrs. Burney, did she leave alone? A. Yes.

Q. No one went with her? A. No.

Q. Did there come a time, Mrs. Burney, when she returned back to your house again after she had left? A. Yes.

Q. Would you estimate for us, as best you can recall, how long a time of period that was before she came back? A. About 20 minutes or half an hour.

47 Q. When she came back to your house, did you have a talk with her? Not what the talk was, but did you have a talk with her? A. Yes.

Q. As a result of that talk with your sister, what did you do? A. I --

Q. Did you call anybody? A. Yes, I called the police.

Q. You called the police. Did there come a time, Mrs. Burney, that the police came to your house after you called? A. Yes.

Q. Do you recall how much time elapsed between the time you called and the time that the police officers got to your house approximately? A. Between eight and 15 minutes.

Q. Between eight and 15 minutes. Now, when Mrs. Davis, your sister, arrived at your house that evening, Mrs. Burney, had you called her to come over to your house before that? A. Yes.

Q. And when she came to your house did she come alone or did she come with anyone? A. Alone.

Q. She came alone. A. Um, hum.

48 Q. Were you working at that time, Mrs. Burney? I mean by that, were you employed on that day, at that time? A. No.

Q. You were not? A. I don't think so.

Q. And how old are you, Mrs. Burney? A. Thirty-seven.

Q. Thirty-seven. When the police responded to your house, Mrs. Burney, do you remember if they left your house with the complaining witness, Mrs. Davis, your sister? A. Yes.

Q. And did they return again to the house after they had left the first time with her? A. Yes.

Q. And did they leave again after that? A. Yes.

Q. I want to direct your attention, Mrs. Burney, to the defendant, David Dukes, seated in the middle here at the counsel table. Did you know him on that particular date of November 4, 1954? A. No.

Q. Was he at your house at the party on that particular night? A. No.

49 Q. Had you seen him at all or did you see him at all on the night of November 3, and the morning of November 4, 1954? A. No.

MR. TITUS: Your witness.

CROSS EXAMINATION

BY MR. ROBINSON:

Q. Now, Mrs. Burney, were you having a party at your house on the evening of November 3, 1954? A. I was not.

Q. What, if anything, was going on between the hours of, say, 8:00 and midnight? A. My girl friend -- shall I explain?

Q. How is that? A. Am I to explain?

Q. No, just in general what was going on during those hours? A. There was nothing going on. I don't understand you.

Q. Well, was there any dancing going on? A. Yes, we danced.

Q. Any drinking? A. You asked me was it a party.

Q. Yes. A. Well, this friend of mine, it was an accidental, just a drop-in. Occasionally I fixed my sister's hair. On this night I

50 would have, if these friends hadn't dropped in, but they accidentally dropped in. The couple came first and then before she arrived, she was probably on her way. The two fellows dropped in. That's it and --

THE COURT: Just a minute. Ask your next question.

BY MR. ROBINSON:

Q. Was there any drinking going on during this time? A. I think three of them had a beer.

Q. Three? A. We had a six-pack, but only three of them were drank. I don't know.

Q. Was there any Scotch present? A. Not that I know of. I don't think so.

Q. Do you recall whether or not your sister had anything to drink that evening? A. I know she had a beer. I don't know that she drinks Scotch.

Q. Do you recall whether or not any of the men present had anything to drink? A. Well, this fellow Joe, he drinks occasionally, and he --

Q. I mean, I am referring to that particular evening. Do you know whether he had anything to drink that evening? A. Oh, yes.

51 Q. Now, your sister left your house alone, is that correct? A. Yes.

Q. Had any of the other persons present left before she did? A. No.

Q. Do you recall whether or not any of them left shortly after she did? A. They didn't. They were all there when she arrived back.

Q. And from the time that she left until she returned the first time, I believe you said it was about a half hour, is that correct? A. Um, hum.

Q. Now, during that time, did you hear any unusual noises or any cries or anything? A. I did not.

Q. Now, when your sister came back to the house, the first time, did she show any bruise marks or scratches or cuts or anything about her face or body? A. It was a scratch on her wrist.

Q. Her what? A. Her wrist. Her left wrist.

Q. Anything else that you recall? A. You could tell something was wrong -- just --

52 Q. Excuse me. I mean, did you notice any cuts or bruises or anything like that, other than what you have just mentioned? A. No.

MR. ROBINSON: No further questions.

REDIRECT EXAMINATION

BY MR. TITUS:

Q. Mrs. Burney, just one question. You say her left wrist had a scratch on it?

MR. LAWSON: I object to that. She didn't say her left --

THE COURT: The witness added "left," Mr. Lawson. After she finished her sentence, she said "left wrist."

MR. LAWSON: I am sorry. I apologize. I didn't hear that. Sorry.

BY MR. TITUS:

Q. Was that, did you know, was that the wrist on which she wore her wrist watch? A. Yes, it was.

MR. TITUS: Thank you. That's all.

THE COURT: Step down.

(The witness left the stand.)

Whereupon

IRVING L. LUPINI

was called as a witness by the Government, and having been duly sworn,

53 was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

Q. Officer, state your name, please. A. Private Irving L. Lupini.

Q. Attached to what precinct? A. 10th Precinct, assigned to Scout 101.

Q. That's the Metropolitan Police Department? A. Yes, it is.

Q. And Private Lupini, were you attached to that same precinct on the early morning of November 4, 1954? A. Yes, sir, I was.

Q. And what type of duty were you working at that time?

A. Scout car patrol duty.

Q. Now, I want to direct your attention, Officer Lupini, to the premises 3613 13th Street, Northwest, here in the District of Columbia. Did you have occasion to respond to those premises on that particular morning? A. Yes, sir, I did.

Q. About what time did you get there? A. About -- arrived there about 12:48, received a call about 12:45 -- about three minutes after the call.

Q. About three minutes after the call? A. Yes, sir. In transit.

54 Q. When you arrived, did any other officers from any other squad arrive approximately the same time, Officer? A. Yes, sir. At the time

I received the call, I was advised that this officer --

Q. I am sorry. Not what you were advised. When you got there did you see any other officers there? A. Shortly thereafter.

Q. Who was that. A. Sgt. Elliott of the Sex Squad.

Q. Of the Sex Squad. Now, Officer Lupini, when you arrived at that house, that was Mrs. Burney's house, was it? A. Yes, sir, it was.

Q. When you arrived at that house, did you see the complaining witness, the lady in the yellow dress, Mrs. Davis, Ruth L. Davis? A. Yes, sir, I did.

Q. And did you and -- or did you have any conversation with her? Don't tell us what it was. Did you have a conversation with her? A. Yes, sir.

Q. After that conversation with Mrs. Davis, did you go anywhere with her? A. Yes, sir, I did.

Q. Did anyone else accompany you when you went? A. Yes, sir. Sgt. Elliott and the complainant.

55 Q. And the complaining witness Ruth Davis? A. Yes, sir.

Q. Where did you and Mrs. Davis and Sgt. Elliott go? A. To the rear of 3607 13th Street, Northwest.

Q. Was that the rear of that particular address? A. Yes, sir, it is.

Q. When you got back to this -- by the way, what is that that you went into the rear? A. It is off the alley into a back yard.

Q. From the alley into a back yard? A. Yes, sir.

Q. When you got back there, did you have occasion to examine the area in that particular back yard? A. Yes, sir, I did.

Q. Was that pointed out to you by anyone? A. Yes, sir, it was.

Q. By whom? A. Mrs. Davis.

Q. Did you pick up anything or find anything in that area on the ground or did Sgt. Elliott pick up anything in your presence? A. Sgt. Elliott did, I think. I didn't.

Q. What was that, if you know? A. A comb.

Q. A comb? A. Yes, sir, it was.

56 Q. Did Sgt. Elliott return that comb to anyone? A. Mrs. Davis. She said it was hers.

Q. Did you see any particular spot or mark on that area that was pointed out to you?

MR. ROBINSON: Objection, Your Honor. That is a leading question.

THE COURT: I think the question was leading. You may rephrase it, Mr. Titus.

BY MR. TITUS:

Q. Officer Lupini, in your own words, what did you find back in that alley or back in that particular area off the alley when you examined it? A. A spot was pointed out to me on the first step of the stairway leading up to the house at 3607 13th in the rear.

Q. What kind of a spot, Officer? A. A wet spot, appeared to be semen.

Q. A wet spot? A. Yes, sir, it was. At the same time --

Q. No, excuse me. Now, did you see anything else in that alley or in that rear of that -- A. Yes, sir. In front of the step, about four feet away from it, were -- appeared to be toe marks from shoes into the ground.

Q. Toe marks? A. Yes.

57 Q. From a shoe? A. From shoes.

Q. Shoes. A. Yes, sir.

Q. Where was the -- if you know, where was the comb that was picked up by Sgt. Elliott, specifically? A. Specifically, I don't recall, but it was within the general area in the back yard.

Q. Sgt. Elliott is here? A. Yes, sir, he is.

Q. After this had occurred back in the back of this particular house, what did you and Sgt. Elliott then do with the complaining witness, Mrs. Davis? A. I returned to service and she accompanied Sgt. Elliott, I believe, on for further examination.

MR. TITUS: Your witness.

THE COURT: Do you want to establish situs in the District of

Columbia by this witness, Mr. Titus?

MR. TITUS: Yes, Your Honor. Thank you very much.

BY MR. TITUS:

Q. This area that you have described, you called it the back of 3607 13th Street, Northwest? A. That is correct, sir.

Q. Is that here in the District of Columbia? A. Yes, sir, it is.

58 THE COURT: Mr. Robinson.

CROSS EXAMINATION:

Q. When you responded to the call, you were alone in the Scout car? A. No, sir. I was accompanied by Private Carl E. Gallasco. He is no longer on the Metropolitan Police Department. He is resigned and managing a business in Connecticut.

Q. Officer, I believe you testified that you examined a step area in back of the house, is that correct? A. That is correct, sir.

Q. Did you make any investigation of the house itself? A. The inside of the house?

Q. Yes. A. No, sir. I never entered the house.

Q. You did not ascertain whether anyone lived there or anyone was present in the house, is that correct? A. I believe that was done, but not by me.

Q. Do you recall whether or not anyone in your group knocked on the door of that house? A. I can't say. I don't remember.

Q. Were any other parties other than yourself and Sgt. Elliott and your partner and the complainant present in the alley while you conducted this investigation? A. At this time, the first time?

59 Q. Yes. A. No, that was all. Sgt. Elliott's partner. I don't recall his name.

Q. You did not notice anyone walking through the alley at the time? A. No, sir, there was no one there.

MR. ROBINSON: No further questions.

THE COURT: Any further questions? You may step down.

THE WITNESS: Thank you, Your Honor.

(The witness left the stand.)

Whereupon

LEO L. LYONS

was called as a witness by the Government, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

Q. State your name, please. A. Leo L. Lyons.

Q. And are you an officer attached to the Metropolitan Police Department? A. Yes, sir.

Q. Detective attached to what precinct? A. No. 10 Precinct, sir.

60 Q. I want to direct your attention, Detective Lyons, to the month of November 1954, were you attached to the same precinct at that time? A. Yes, sir, I was.

Q. Specifically, Detective Lyons, I want to direct your attention to the defendant, David Dukes, seated between his counsel. Did you have occasion to place this defendant under arrest? A. Yes, sir, I did.

Q. Where was that? A. That was on the night of November 21, 1954, at approximately 10:40 p. m., in the 5000 block of Georgia Avenue, Northwest.

Q. After you placed the defendant under arrest, Detective Lyons, did you have occasion to search the clothing that he was wearing at that time? A. When he was taken to No. 6 Precinct, yes, sir.

Q. I want to show you what has been marked as Government Exhibit No. 1, for identification. Will you look at that lighter and tell the jury and Court whether you have seen that lighter before? A. That, sir, is the lighter that was taken out of his pocket.

Q. Out of whose pocket? A. Out of the defendant Dukes' pocket.

61 Q. At the time of the searching of the clothing? A. Yes, sir.

MR. TITUS: Your Honor, I want to offer this lighter in evidence at this time, Government Exhibit No. 1, marked for identification.

THE COURT: Is there any objection?

MR. ROBINSON: Yes, Your Honor. I would like to know from the

officer if he recovered the lighter.

THE COURT: I will reserve passing on the tender in evidence until counsel has had an opportunity to cross examine this witness.

MR. TITUS: Very well, Your Honor.

BY MR. TITUS:

Q. Detective Lyons, this particular lighter that you say came from the clothing of the defendant, did you, yourself, recover that lighter from the clothing? A. I searched him, yes, sir.

Q. And did you recover that lighter? A. Yes, sir, I did.

Q. Do you recall where on his clothing that lighter was? A. I believe, sir, it was in his pants trousers, but I am not positive.

Q. Was the searching that you have just described of the defendant's
62 clothing done on the date of November 21, 1954? A. Yes, sir, it was.

MR. TITUS: Your witness.

CROSS EXAMINATION

BY MR. ROBINSON:

Q. The defendant was under arrest at the time you searched him? A. Yes, sir, he was.

Q. This took place at the police headquarters? A. No, sir, it did not.

Q. Take place at the place of arrest? A. No, sir, he was searched at No. 6 Precinct.

MR. ROBINSON: No more questions.

THE COURT: You may step down.

(The witness left the stand.)

MR. TITUS: Your Honor, at this time, there is a stipulation which I think would be offered more appropriately now.

May we approach the Bench for the purpose of informing the Court of that?

THE COURT: Have you agreed on the stipulation?

MR. TITUS: We have, but I would like to -- the Court to be informed of the background with regard to this.

THE COURT: Very well.

(At the Bench:)

63 MR. TITUS: May it please the Court, the Court will recall that I indicated that the complaining witness had been treated or rather examined at the District of Columbia General Hospital at about 2:30 a. m. on the morning of November 4, 1954, and that this examination was conducted by Dr. Harvey Cohen - C-o-h-e-n -- of the staff of the District of Columbia General Hospital.

This doctor is now stationed in New York at a cancer clinic. He was down on a prior occasion that this particular case was on for trial.

And, at that time, so that we could on that particular date, obtain a continuance, which was necessary for other reasons, counsel, Mr. Lawson and Mr. Robinson agreed to a stipulation of the medical records concerning the examination of the complaining witness.

I have the photostat of that medical record and I wanted just to be sure now, because we haven't talked for a couple of months, that that is the stipulation that this entire record should be offered. Is that correct, Mr. Lawson.

MR. LAWSON: That is right.

MR. TITUS: Mr. Robinson?

MR. ROBINSON: Um, hum.

THE COURT: Very well. It will be stipulated that the medical records of the D.C. General Hospital showing the examination of the complaining witness, Ruth L. Davis, at or about 2:30 a. m., on November

64 4, 1954, may be admitted in evidence. Is that correct, sir?

MR. TITUS: Now, Your Honor, the -- may this be shown to the jury? I think they could read this photostatic copy as well as I could read it to them.

(The Court examines photostat.)

THE COURT: I think it would be better if you read it to them. It will take only about a twelfth as much time if you read it to them.

MR. TITUS: All right.

MR. ROBINSON: I have never seen it.

THE COURT: Oh, excuse me.

MR. ROBINSON: We knew about it, but I just wanted to check and see that no statements made by the complainant --

(Mr. Robinson and Mr. Lawson examine photostat.)

THE COURT: The exhibit will be marked as Government Exhibit No. 3, so it will be identified in the record.

(Photostat of medical record marked as Government's Exhibit No. 3 and admitted in evidence.)

MR. TITUS: Shall I read it to them at this time, Your Honor?

THE COURT: Yes.

(In open Court)

MR. TITUS: At this time I am reading a complete medical examination report, called a Report Blank, signed by Dr. Harvey Cohen of
65 the staff of the District of Columbia General Hospital.

This particular document which I am reading from has been received in evidence by the Court.

Date, 11-4-54. Time, 2:30 a. m. Name, Davis, Ruth. Address, 220 - Your Honor, I can only make this out as L-a-v-i-n-e Place, Northeast. I think it might be in error.

Race, colored. Sex, female. Brought in by WB, which I believe is Women's Bureau, Your Honor.

Present illness, "patient claims to have been raped early this a. m."

Then the next line is P.E. Temp, pulse, respiratory, and the initials BP, which are not filled in.

Below that is the word, "Pelvic, no abrasions, tears, etc., not remarkable." Marked, "marital introitus. Patient may or may not have had recent intercourse." Impression, "urethral and cervical smears taken."

Treatment, "Patient very calm and relaxed. Patient -- I am afraid I can't read this word. It looks like "operative," Your Honor.

THE COURT: Cooperative. "Patient cooperative" appears similarly on the next page, Mr. Titus.

MR. TITUS: Thank you, Your Honor.

Medico Legal Examination Report Blank. Date of examination,
66 11-4-54. Hour, 2:30 a. m. Name, Ruth L. Davis. Color, colored. Age, 30. Agency referring case, WB.

Purpose of examination, "To determine recent intercourse."

History of case, "Patient claims to have been pushed onto a porch and raped this evening."

Appearance of patient, "Calm, collected, cooperative." Clothing, odor of breath, blood specks, bruises, etc., "Clothing not remarkable. No bruises noted. Odor of breath nor remarkable."

General physical exam, "Not remarkable. Gynecological exam, "Not remarkable."

External genitals, appearance of hymen, vagina, cervix, adnexia, etc., "Not remarkable. No abrasions, tears seen."

Impression, state clearly. "Marital introitus; patient may or may not have had recent intercourse." Examining physician, Harvey J. Cohen, M. D.; special reports, "Urethral and cervical smears taken."

I will pursue this with my next witness, Your Honor.

THE COURT: Very well.

Whereupon

JOSEPH FEDORKO

was called as a witness by the Government, and, having been duly sworn, was examined and testified as follows:

67 DIRECT EXAMINATION

BY MR. TITUS:

Q. State your full name, please. A. Joseph Fedorko. F-e-d-o-r-k-o.

Q. Mr. Fedorko, what is your home address? A. 2711 Q Street, Southeast.

Q. And what is your occupation, Mr. Fedorko? What is your job? A. I am a bacteriologist.

Q. And where are you working at this time, sir? A. District General Hospital.

Q. District of Columbia General Hospital? A. Yes, sir.

Q. And how long have you been a bacteriologist in that particular hospital? A. How long? Seven years.

Q. You were there, then, were you in November of 1954? A. At that time I worked for the District Government at the District General Hospital.

Q. The District Government. What was your job at that time, November 4, 1954? A. I was technician in bacteriology.

Q. A technician in bacteriology. What does that encompass? What does that mean? A. It means I assisted in the identification of

68 organisms isolated from clinical material.

Q. Did you work in cooperation with various medical doctors at the District of Columbia General Hospital at that time? A. Yes, sir, I did.

Q. Were you familiar with or acquainted with Dr. Harvey Cohen of the staff of the hospital at that time? A. No, I wasn't.

Q. Do you know the name, or did you subsequently learn the name of that doctor? A. I subsequently learned the name.

Q. Now, pursuant to my request, Mr. Fedorko, did you determine from the records of the hospital kept by yourself or other persons whether or not on the morning of November 4, 1954, you performed an analysis of certain smears taken from a patient known as Ruth L. Davis? A. That is true.

Q. Do you recall by whom that particular examination that you made was requested? A. I don't recall, but, evidently, was requested by the --

THE COURT: No. Don't guess. If you don't know, say you don't know.

THE WITNESS: No, I don't.

MR. TITUS: Your Honor, may this be marked as Government Exhibit No. 4, for identification?

69 THE COURT: It will be so marked.

(Report marked as Government's Exhibit No. 4 for identification.)

BY MR. TITUS:

Q. Mr. Fedorko, do you have an independent recollection, sir, at this time of the time of day on which you made your analysis of these smears that you refer to? A. In the afternoon, I believe it was.

Q. In the afternoon of what date, do you recall, sir? A. No.

Q. You don't have an independent recollection? A. No, I don't.

Q. Would you look at what has been marked as Government Exhibit No. 4, for identification, does that refresh your recollection as to that examination, Mr. Fedorko? A. I have many such examinations and I can't recollect any particular one.

Q. Now, would you look at that and determine whether or not that exhibit before you is in your handwriting? A. Yes, it is.

Q. And to whom does that exhibit refer, to what patient? A. Ruth Davis.

Q. And does it indicate the time of your examination on there, Mr. Fedorko, or the date? A. It indicates the date but not the time of day.

70 Q. What was the date? A. 11-14-54.

Q. What particular smears were examined by you, sir? A. Urethral and cervical smears.

Q. What was found in the urethral smears? A. Nothing of significance.

Q. What was found in the cervical smears? A. Cervical smear was positive for sperm.

Q. Positive for sperm? A. Yes, sir.

Q. Which means that there was sperm in that smear? A. Yes, sir, there was.

MR. TITUS: Your witness.

CROSS EXAMINATION

BY MR. ROBINSON:

Q. Now, did you conduct that examination yourself? A. I stained the slide and examined it, yes, sir.

Q. And the report to which you have just referred was made by you, is that correct? A. Yes, sir, it was.

MR. ROBINSON: That is all I have.

THE COURT: What is sperm, Mr. Witness?

THE WITNESS: Sperm is the male factor involved in reproduction of life.

71 THE COURT: Very well. Any further questions? Step down.

(The witness left the stand.)

Whereupon

MARY PORTER

was called as a witness by the Government, and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

Q. Are you feeling all right now, Mrs. Porter? A. Yes, sir.

MR. TITUS: Your Honor, this witness recently had an attack in the hall and that was why I was asking.

BY MR. TITUS:

Q. Mrs. Porter, what is your -- give us your full name first.

A. Mary E. Porter.

Q. P-o-r-t-e-r? A. Yes.

Q. Talk right into the microphone. And where do you live, Mrs. Porter? A. 1331 9th Street, Northwest.

Q. Ninth Street, Northwest? A. That is right.

Q. Here in the District of Columbia? A. Yes.

72 Q. Are you related, Mrs. Porter, to the defendant in this case? David Dukes? A. Yes.

Q. In what manner? A. Cousin.

Q. Cousin? A. Yes, sir.

Q. Where were you living, Mrs. Porter, during the month of November, 1954? A. The same address.

Q. Same address? A. Yes, sir.

Q. Your husband is Andrew Porter? A. Yes, sir.

Q. Mrs. Porter, did there come an occasion during the month of November, 1954, when you and your husband made a purchase of

something from the defendant in this case? A. Yes.

Q. What was that? A. Watch.

Q. A watch? A. Yes.

Q. Mrs. Porter, look at this watch, the face of the watch, with the four, what appear to be diamonds, and tell the Court and jury whether

73 you recognize that. A. Yes.

THE COURT: The witness is examining what, Mr. Titus?

MR. TITUS: Government Exhibit No. 2, I believe it is, Your Honor.

THE COURT: Very well.

MR. TITUS: Government Exhibit No. 2, Your Honor, marked for identification.

BY MR. TITUS:

Q. Is that the watch, Mrs. Porter, that you and your husband purchased from the defendant? A. Yes, it is.

Q. What condition was it in, if you remember, at the time it was purchased by you from the defendant? A. If I make no mistake, I think it had a black band and the band, you know, just like it had been snatched off, if I make no mistake.

Q. The band looked like it had been snatched off? A. Yes, a small black band.

Q. And how did this particular band get on there, do you know? A. Yes.

Q. How? A. The gentleman next door, about three doors from where I live, it's a watch place, and he put that band on for me.

74 Q. After you had bought it? A. Yes.

Q. How much did you pay the defendant for that watch? A. My husband paid him $5.00.

Q. And that was in November, 1954? A. Well, I mean, I don't exactly remember the month or the date.

Q. Do you remember the year, 19--? A. I wouldn't remember that.

Q. All right.

MR. TITUS: Your Honor, I, at this time, will offer into evidence Government Exhibit marked No. 2 for identification.

THE COURT: Is there any objection?

MR. ROBINSON: Could we reserve that also, Your Honor?

THE COURT: You may.

MR. TITUS: That is all I have of this witness.

* * * * *

78 ANDREW PORTER

was called as a witness by the Government, and, having been duly sworn, was examined and testified as follows:

79 DIRECT EXAMINATION

BY MR. TITUS:

Q. State your name, please. A. Andrew Porter.

Q. And, Andrew Porter, where do you live? A. 1331 Ninth Street, Northwest.

THE COURT: What is it?

THE WITNESS: 1331 Ninth Street, Northwest.

BY MR. TITUS:

Q. You are the husband of the witness who just was on the stand, Mary Porter? A. Right.

Q. And you knew the defendant as a relative of your wife's back in November, 1954, did you? A. Sure.

Q. Did there come a time, Mr. Porter, when you purchased something from this defendant? A. Yes.

Q. What did you buy from him? A. Watch.

Q. Do you remember when you bought that watch? A. I don't remember the date or anything like that, but I remember I bought it.

Q. Do you remember the year, Mr. Porter? A. '54, I think it was.

80 Q. '54? Mr. Porter, will you look at what has been marked as Government Exhibit No. 2 for identification. Look at the face of that watch and tell the jury and the Court whether that is the watch you bought. A. I think so.

Q. Why do you think so, Mr. Porter? A. Because it resembles the watch to me. It resembles the watch to me.

Q. How does it resemble it, Mr. Porter? A. Because he had this watch in a piece of paper on the job and he told me he found the watch, he had it wrapped up, and we all looked at it -- colored piece of paper. He had it around there four or five days. So, he wanted to sell the watch, so I give him $5.00 for the watch.

Q. What about the watch now makes you think that's the same watch you bought from the defendant? A. What makes me think it's the same watch? Why --

THE COURT: Don't talk so fast.

THE WITNESS: Well, I said, they might be diamonds, but I thought they were cut glass.

BY MR. TITUS:

Q. Might be diamonds, but you thought that they were cut glass?

A. Yes. I thought they might be diamonds, but I thought cut glass.

81 Q. Are you talking about the four stones that appear on the face of the watch? A. That's right.

Q. Is that why you think it's the same watch? A. That's right.

Q. Is it the same square type of watch that you bought? The face of the watch? A. Yes, same face like the one I bought.

Q. Like the one you bought.

* * * * *

CROSS EXAMINATION

BY MR. ROBINSON:

* * * * *

82 Q. Can you say positively that that is the watch you purchased from the defendant? A. From the time that I bought the watch from -- that I couldn't swear to if it's the watch or is not the watch. Been so long I had forgotten about it.

* * * * *

85 Washington, D. C.
Friday, June 26, 1959

The above-entitled cause came on for further hearing before THE HONORABLE EDWARD A. TAMM, United States District Judge, and a jury, at 1:45 p. m.

* * * * *

91 MR. ROBINSON: We would like to move at this time for a directed verdict of acquittal with respect to --

THE COURT: Keep your voice up a little.

MR. ROBINSON: Based upon the grounds of insufficiency of the evidence and the various objections I have raised to the admission of the exhibits set forth. I think that particularly with respect to the testimony of the complaining witness herself, that was not sufficiently clear and detailed as to indicate an offense. I think that her testimony, primarily, she made what I would define as a conclusion.

She stated that she had sexual relations and, basically, that is the extent of her testimony. It is possible that the jury may assume from that
92 that a crime of rape was committed, but dealing with her testimony as a whole, and the matter of the evidence such as the watch and the cigarette lighter, I don't think that the government has sustained its burden of proving beyond a reasonable doubt, and has failed to set forth sufficient evidence to go to the jury on the question of his guilt.

THE COURT: Anything more?

MR. LAWSON: If Your Honor please, I would just like to say that I think the evidence is incomplete as to rape itself. And there has to be some kind of corroboration, and my recollection of the testimony is there was no completion of the act. And even with this technician's, even if Your Honor allows that, which I think you should not, but if that is allowed, there is still not the kind of corroboration required by the law, in this case. There is evidence of attempted rape. I think there is no evidence at all of the complete penetration. Nothing was said about it.

THE COURT: The witness, Mrs. Ruth L. Davis, testified in answer to one of Mr. Titus's questions that the defendant continually

told her, quotes, "Be quiet and you won't get hurt." She said at a later point in her testimony that she was scared. She then said the defendant had sexual relations with her.

Later, on cross-examination, in answer to a question of Mr. Robin-
93 son, she said that she did not call out but she raised her voice but that the defendant told her to be quiet, that she was scared, that she tried to push the defendant back.

I think the question of whether force was used, whether the sexual intercourse which the plaintiff says the defendant had was aginst her will, is a factual question for the jury.

I think the corroboration, Mr. Lawson, come from, one, the statement of the complaining witness's sister, Mrs. Helen Burney, this is in answer to questions on cross-examination, that, quote, "You could tell that something was wrong with her." referring to the complaining witness, plus the testimony of the witness Fedorko, and the stipulation, that the hospital records show that she could or could not have had recent intercourse. I think it creates a factual question for the jury.

I believe I must deny your motion for judgment of acquittal.

* * * * *

94 DR. GERHART J. GORDON

was called as a witness by the defendant and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROBINSON:

Q. Your name, sir? A. I am Dr. Gerhart J. Gordon, clinical director in the psychiatric service of the District of Columbia General Hospital.

Q. What is your profession, sir? A. I am a psychiatrist.

Q. Will you relate to the Court and jury what your educational qualifications are.

THE COURT: The Court will recognize the witness's professional qualifications, Mr. Robinson.

MR. ROBINSON: Your Honor, if I may do so, could I have the record show in detail those qualifications? I don't think it would take too long hearing him.

THE COURT: Very well.

95 Will you state your educational background and your professional experience.

THE WITNESS: Yes, Your Honor.

I have been in the psychiatric field over twenty-four years. I have been associated for fifteen years with Delaware State Hospital, Wilmington, Delaware, and with D. C. General Hospital, psychiatric service over nine years. I am certified in psychiatry by the American Board of Psychiatry and Neurology.

Q. (By Mr. Robinson) And where did you receive your degrees, Doctor? A. I am a graduate of the University of Berlin Medical School, Germany.

Q. Doctor, have you testified in this court and others as to psychiatric evaluation of persons accused of crime? A. Yes; I have served as expert witness in this court on numerous occasions.

Q. During your duties at D. C.General Hospital, did there come a time when you had occasion to examine the defendant David Dukes? A. Yes. I had occasion to examine the defendant David Dukes in District of Columbia Jail on ten occasions. The dates being November 25th, 1954; November 26th; December 1st; December 7th; December 11th; December 28th; January 12, '55; January 13; February 9 and February 15, 1955. Altogether, ten times.

96 Q. Did you have occasion to conduct examinations of the defendant at D. C. General Hospital? A. No, I had not.

Q. Could you relate briefly what the nature of the examinations you conducted were. A. Well, I tried to get background information; his medical history, his social background, and of course I conducted an examination to determine to what extent he was presently mentally disturbed. And I made a report to the Court at the time indicating, on the basis of these examinations, that I did find him to be of unsound mind.

Q. During the course of your examination were you able to obtain any of the past history of the defendant? A. Yes. He told me, certainly in the beginning, during the first interviews, quite a bit about his social background, and that was of course quite interesting. I can give you a few of the highlights.

Q. All right, sir. A. He told me that he had never known his father. He was twelve or thirteen years of age when his mother died. He went to schools in Pittsburgh and Washington, D. C., reaching the eighth grade. He was fifteen or sixteen when he quit school. He says he was in reform school in Pittsburgh for running away from home and not going to school.

97 He says he was locked up in Pittsburgh for armed robbery in January '52. He said later, rather in November '51 and he was sentenced in January '52.

He left Industrial Training School, Harrisburg, in April '54. He has never been in military service.

He was in the hospital in Industrial Training School in Harrisburg for three days. He would complain of headaches. He says when a youngster he was hopping trucks and he fell off of a moving truck on the street in Pittsburgh. He says he got knocked unconscious but can't tell how long and didn't go to a hospital. Ever since this accident he claims he has had headaches coming and going, lasting for hours sometimes. When he has headaches he will begin to drink. He says he can't stop it when he is at it. Sometimes he can't recall what has happened when he has been drinking. He will also walk and walk and then find himself in strange places or at home.

Sometimes things will come back to me; sometimes I get scared, afraid I might have done something wrong. He says he has been drinking ever since his mother died.

He said he got married on July 3rd, 1954, in Washington, D. C., and he said his wife was pregnant. He stated he had been drinking every day.

Sometimes he catches himself hollering in his sleep. Sometimes he gets afraid of the dark. Sometimes when he gets scared he will go
98 out of the house. Sometimes he has been hearing voices, telling him you are no good, accusing him in his dream. But he knows it is not real.

He says he does not believe he is crazy but he needs some help. It seems every place he went people seem to be against him except for his wife.

And so on.

Q. Now, during the course of your examination, Doctor, was any course of treatment prescribed for the defendant? A. Well, we did not assume responsibility for the treatment. I do have, however, information to the extent that he did become quite disturbed while in jail and I think at one time he was even placed in isolation cell. His behavior was very --

MR. TITUS: Your Honor, I will have to object. I don't know what information this was that the doctor is talking about.

THE COURT: Will you confine your testimony, Doctor, to the facts within your own knowledge.

THE WITNESS: Yes, Your Honor. I did read the medical, I had occasion to read the medical record kept in the hospital. And I know that one of the doctors there made an attempt at treating him. I don't know whether that was successful or not. You see, he told me he was supposed to have an injection but got very scared and he thought the doctor might
99 poison him. That is what he told me afterward.

Q. (By Mr. Robinson) Doctor, those events you were just relating a few seconds ago, those were events which took place at the D.C. Jail after the first examination you made of the defendant, were they not? A. I do not quite understand. All these examinations that I made were the results of my seeing the patient in jail. I mean, I didn't see him any other place.

Q. Based upon your examination of the defendant, Doctor, do you have an opinion as to his mental condition? A. I could, of course, judge the patient solely on the basis of my examinations in jail and I can

only say how he was when I saw him in jail. Then he was mentally sick. But how he was any time before that, I couldn't tell.

Q. The opinion which you have just related, is that your opinion as to the defendant's mental condition as of November 1954, Doctor? A. That is as of the times I have seen him in jail, beginning November '54 and ending February, '55. That means my examinations, as a result of my examinations, I thought it consistent and permitted me to consider him then of unsound mind.

Q. Are you in position at this time, Doctor, to testify, based upon your experiences and your observations and so forth, as to whether this
100 condition of mind antedated November 1954? A. No, I could not possibly say that. I don't know when it began. I don't have the slightest idea.

Q. Doctor Gordon, do you have an opinion as to whether or not the crime with which the defendant was charged was a product of or is there a causal connection between his condition and that of the crime? Do you have an opinion as to that? A. No; because I do not know his mental condition at the time of his offense.

MR. ROBINSON: You may examine.

CROSS-EXAMINATION

BY MR. TITUS:

Q. Doctor Gordon, you testified, I believe, that your first examination was November 25, 1954. Am I correct? A. Yes.

Q. And for how long a period of time, Doctor, did you see him on that occasion, if you know? A. Well, I cannot possibly tell you exactly, but I wrote down here one hour plus. So it probably means I have seen him longer than an hour.

Q. In total, Doctor, from your first examination to the last examination of the defendant, will you tell the jury how many hours you have
101 seen this defendant. A. That is pretty hard for me to tell you now, because I really don't recollect exactly. But I am sure it is quite a bit of time I spent in jail and, having seen him ten times, I think that requires quite a bit of time.

Q. Doctor Gordon, what was the specific mental condition that you found existing at the time of your examinations in this particular defendant? Specific condition. A. Well, I diagnosed him undifferentiated psychosis, viewing the fact that he had a lot of variegated antisocial antecedents and a questionable accident that knocked him out. Of course, I cannot prove it. But the fact that he got actually worse from time to time, from the beginning toward the end. He actually got worse.

Q. Doctor -- A. But I kept seeing him.

Q. If you don't mind, would you tell me what that disease is.

A. Undifferentiated psychosis, type differentiated. We used to --

Q. Doctor, I don't want to go into a definition of it. If you have anything more to add. Just undifferentiated psychosis? A. Yes; undifferentiated.

Q. Doctor, would you tell the Court and jury what is prison psycho-

102 sis. A. Well, the prison psychosis is a psychosis that usually occurs in people confined, as a result of the confinement.

Q. In this particular instance you examined the defendant while he was in jail, did you not? A. Yes.

Q. Would you eliminate the possibility that he was suffering a prison psychosis at the time you examined him? A. I did not eliminate that possibility.

Q. Is it a strong or good possibility? A. It is a very good possibility that this was one of this kind.

Q. And that type, that is a mental disease, is it not? A. Yes. After all, it is a psychosis and is a mental, by delusions of persecution and hallucinations of the auditory and visual type. Fears.

Q. All right, sir. A. I mean, this sums up to this category.

Q. And it is the type of thing that begins after a defendant is arrested and confined in jail? After he is arrested and confined in jail?

A. Yes; as a result.

Q. As a result? A. Precipitated by the confinement.

103 Q. In this particular instance, Doctor, the crimes charged in the indictment, as you may be aware, occurred on November 4, 1954, twenty-one days before you first saw him? A. Yes.

Q. Do you have any opinion as to his mental condition at that time whatsoever? A. No; unfortunately, none whatsoever. Because I surely don't know and yet have been unable to find out how long this condition was in evidence and I am sure that the patient, the defendant, in his abnormal mental state could not possibly be considered a very reliable informant.

Q. Could not be considered a very reliable informant? A. No.

Q. And, Doctor Gordon, outside of what the defendant told you this so-called fall that he received, I believe you testified? A. Yes.

Q. That is all you know about it, isn't it? A. Yes.

Q. In other words, you just know he told you? A. I just know what he told me.

Q. And you consider him not to be a reliable informant; is that right? A. I only said while he was "psychotic" he could not possibly be one. Surely a psychotic person can never be considered a reliable
104 informer. That means, partly, because if he gets confused he will be so clouded that his memory capacity will fail him.

Q. Yes. And in this case every time you saw him in your opinion he was psychotic? A. Oh, yes.

Q. Therefore he was in that confused state in which his memory would be bad, wasn't he? A. Well, he was confused, yes.

Q. Now, did you have any occasion to consult with members of his family, Doctor Gordon? A. I do not recall at the moment. I only jotted down the address of some relatives. I don't remember.

Q. Well, you would have had notes if you had, wouldn't you, Doctor? A. I probably would.

Q. And you have no such notes, do you? A. I don't remember right now having any. I don't see any.

Q. Wouldn't you say, Doctor Gordon, that the chances of this defendant at the time you saw him having a prison psychosis were at least eighty-twenty? A. Were at least what?

Q. That he had at least 80 per cent chance he had prison psychosis?
105 A. Well, I think, viewing his background, I think he had a good

chance to have the prison psychosis. I couldn't quite express it percentagewise. But I must assume that was a considerable possibility.

Q. A considerable. Better than 50 per cent possibility, wasn't it, Doctor? A. Possibly.

MR. TITUS: That is all, thank you.

THE COURT: Any further questions, Mr. Robinson?

REDIRECT EXAMINATION

BY MR. ROBINSON:

Q. Doctor, would you say that other factors, based upon your observations and interviews with the defendant and other things, entered into your diagnosis besides the possibility of prison psychosis? A. Well, I mentioned that he was complaining of headaches and that he said that this is the aftermath of the accident that he revealed to me. Of course, you see, he never was hospitalized, he told me that. So it's very hard to prove objectively his statements, and from all that I really know is that I could only think in terms of a condition that he might have recovered from. I do not know of any serious consequences of this so-called accident. If it is just headaches alone, why then, as he said, that might have prompted him to drink, as he complained, but then drinking again is a
106 different matter.

As we know, people who drink excessively are given to alcoholic bouts; they may transiently lose their memory, they may transiently forget what they have been doing when they were drunk and all that sort of thing. But of course what this condition has to do with this offense, I wouldn't know. I mean, I couldn't tell.

Q. Would you say that this so-called prison psychosis would develop within the relatively short period when you first began examining the defendant? A. Well, I only said that the psychosis of this kind does develop frequently, and surely could have well developed in this man, with this background.

Q. Doctor, isn't it a fact that the psychiatrist bases his diagnosis or his opinion upon a number of factors, one of which is his evaluation of

things he sees and hears; is that not correct? A. Yes. After all, the interview situation permits him a certain degree of evaluation of the condition of the patient, and in similar reference to the doctor's previous experiences with similar situated cases. That means I don't think you can really be a good psychiatrist without a good experience.

Q. And are you in position to testify that your diagnosis or the opinion which you have related here today is not based entirely upon
107 statements made by the defendant; is that correct? A. Oh, yes, it is based on the history, as well as on the statements made of the defendant and on the behavior as observed.

MR. ROBINSON: No further questions.

THE COURT: Anything more, Mr. Titus?

RECROSS-EXAMINATION

BY MR. TITUS:

Q. What do you mean by based on history? A. Beg your pardon?

Q. What do you mean by "based on history"? What history?

A. His behavior, and the history as he reveals it.

Q. As he reveals it? A. Yes.

MR. TITUS: That is all. Thank you, Doctor.

THE COURT: Doctor, did you make any examination of this defendant to determine whether there was any pathology, any brain damage?

THE WITNESS: No, Your Honor. As for myself, I read the hospital record and found nothing of the kind to prove it. That means he had a physical examination in the hospital.

THE COURT: Did you make any X-ray of the skull as a result of
108 the information that the defendant said he had fallen from a truck or fallen from an automobile?

THE WITNESS: No, I did not order another examination. But I know positively that when he was sent to the hospital everything was checked.

THE COURT: Were any of the so-called brain-wave tests made of this defendant?

THE WITNESS: I don't think any was done at that time.

THE COURT: Doctor, the testimony in this case is that the defendant was arrested on November 21st. Your first examination was on November 25th. Could a prison psychosis of this possible type develop in four days?

THE WITNESS: In a very short time, Your Honor. As a result of confinement. That means the very minute the patients find themselves locked up in jail, then his psychosis may already start.

THE COURT: And is an undifferentiated psychosis a mental disease of such a nature that a man could be perfectly healthy and normal mentally on November 4th and display these symptoms which you found on November 25th? Could the disease arise in that short a time?

THE WITNESS: Yes, I think that is possible.

* * * * *

110 THE COURT: Mr. Titus, the court reporter, Mrs. Wells, has verified from her notes, as well as from the tape recording, that the witness Joseph Fedorko, as Mr. Robinson indicated, said he made his examination in this case on November 14th. The record indicates, of course, that he had this exhibit before him.

MR. TITUS: It was so clear to me when I heard it, Your Honor, that he said the 4th, and I not only had the record and conferred with him as to the fact that he had made that particular examination on that date, that I was so sure of it that I am amazed to find that to be the situation.

THE COURT: I think it would be well to call him back if there is any doubt.

MR. LAWSON: For what it is worth, I got the 14th and immediately called Mr. Robinson's attention to it.

THE COURT: I think it would be well, to eliminate any doubt, to call him back and let's establish the date so that counsel will be completely protected. The difficulty is, of course, that the exhibit has been read to the jury and if there is any error and it should be stricken I want to be

111 certain that it is done, so I think it would be well on rebuttal to call this man back.

MR. LAWSON: Your Honor, two things on that point, without anywise imputing anything to anybody; in the first place, the government has rested on the statement. In the second place, the human element. Here is a man who has testified it is the 14th and he may recall this on the 4th. He is a government witness. And I think it is unfair to give the government two shots. Suppose he says the 4th? After three or four people, or two people and the reporter, said he said 14. I don't think the government should be allowed two shots.

And this, as I understand it, the document would be inadmissible if it is the 14th; which would make all the difference in the world in the whole theory of this case. He just said that this witness's only corroboration, and the case would go out.

I don't think we ought to put this man, to the risk of giving the government two shots.

THE COURT: I don't think there is any question, Mr. Lawson, of two shots. The Court wants to make certain that justice is done in the case, both to the defendant and the community; and, too, that if a mechanical error was made by the witness in giving the date, that, in the interest of placing the accurate facts before the jury, the Court should exercise the

112 opportunity to do so.

MR. LAWSON: There is no question.

THE COURT: I am not satisfied but that if the date turns out correctly to be the 14th, that it may not be grounds for a mistrial. I am not much of a believer in striking evidence from the record. I don't have to use textbook illustrations of the ineffectiveness of that type of thing. If this is error, if this evidence contained in Government Exhibit No. 4 is not proper before the jury, it might be grounds for mistrial.

MR. LAWSON: I was coming to that, Your Honor, in being sure, but the human element, and I think I urge this for the record, the human element would deprive this man, if on one thing the government witness made a mistake, which would be the safer thing. Nobody would have to indicate anything at all. It would be in his mind. I think a capital case, this man's insanity in doubt, and no opportunity to properly explore the

situation as we would otherwise, then it is very important. I just want to put that in the record.

THE COURT: Very well.

MR. TITUS: Mr. Lawson, I would just like to say for the record, Your Honor, at this time, I recall quite clearly that this witness Fedorko, and I know from having interviewed him, that his only recollection of this event, independently, as to date and time, he had no recollection. Con-
113 sequently his testimony as to the date was based upon his refreshed recollection from this particular exhibit, and that was why --

THE COURT: I have indicated, in the interest of having the record accurate, I will give you a chance to recall him.

MR. TITUS: All right, Your Honor. Does Your Honor have any time you want me to have him here?

THE COURT: No, but as a rebuttal witness. You know how long you are going to use your medical witness. We can hear him this afternoon.

MR. TITUS: If I can obtain him by that time, I will try, Your Honor.

THE COURT: I see several of your officer assistants in the courtroom. Perhaps they can get in touch with them.

MR. TITUS: I will ask Sergeant Mackie.

(End of the bench conference.)

MR. TITUS: Will Your Honor excuse me for that purpose.

THE COURT: Very well. You may call your next witness, Mr. Robinson.

SALLIE SANDERS

was called as a witness by the defendant and, having been duly sworn, was examined and testified as follows:

114 DIRECT EXAMINATION

BY MR. ROBINSON:

Q. Will you state your name, please. A. Mrs. Sallie Sanders.

Q. Would you speak into the microphone. A. Mrs. Sallie Sanders.

Q. And where do you live? A. 1118 figure Eight Street, Northeast.

Q. You know the defendant in this case, David Dukes? A. I do.

Q. Are you in any way related to him? A. Off cousin. My uncle raised him.

Q. How long have you known him? A. Since he was about two years old.

Q. Was there ever a time when he lived with you? A. He lived next door to me, with my mother.

Q. Approximately how long did he live next door to you? A. Oh, I guess about a year.

Q. Did you know him when he lived in other sections of the city? A. Yes, I did.

Q. Was there ever a time when you or he lived in other cities here in the country? A. That I knew him? Then?

115 Q. Did you and he live together in other places, not necessarily Washington, but in other cities? A. He lived in Pittsburgh, Pennsylvania.

Q. Did you live there during that time? A. No; I visit there.

Q. During the time the defendant lived next door to you, did you have occasion to see him often? A. Yes, I did.

Q. And when was that? What year? A. Well, I run a grocery store, and he would come over and help me some time.

THE COURT: The witness didn't answer your question.

Q. (By Mr. Robinson) What year was that? A. Well, as near as I can guess, it must have been in '53.

Q. And how old was the defendant then? A. Well, I really don't know. But he was very young, because he just came out the institution.

Q. Did you have many contacts with the defendant in the year 1954? A. Yes, I did.

Q. And where was he living at that time? A. He was living at 1331 Ninth Street.

Q. And how far away is that from where you live? A. About two blocks.

* * * * *

116 A. When he was a small child he lived in Pittsburgh, Pennsylvania, 2254 Westmont Avenue. I would go there on my vacation. That was my uncle and my aunt. He would go off. He wouldn't know when to come back home. They would have to go get him. So he got in some trouble in Pittsburgh. So while I was there they taken him to juvenile court, so they sent him away. And after he came back, well, his aunt had died. His uncle
117 tried to raise him, and he had to work. He have no people. He has sisters and brothers, but he doesn't know anything about them.

So they sent him away. After he got out of there, well, my mother went up there and got him. She had to go get him and put him in school down here. Tried to keep him in school. He wouldn't go to school. The police woman had to keep even behind him trying to get him to go to school.

So finally, after he got of age, he went back to Pittsburgh. He got in more trouble. And when he came back to Washington, he came on his own, after he had got out of the trouble there.

And then he married. But he is a child that never had nobody to speak a kind word to him.

THE COURT: Mr. Robinson, I don't think this is proper testimony.

MR. ROBINSON: Well, I wanted her to relate some of these --

THE COURT: I would suggest that you proceed by question and answer.

Q. (By Mr. Robinson) Can you relate to the jury anything unusual that happened after the defendant was married? A. Yes, I do. Well, when he married, I had a roomer living with me. So she said she would
118 give him a little frame-up, and his wife. My mother's house, it was an alleyway go betwixt. Go out of my door into her door. While we was on the front, she give her room up to him, and his wife. He gets up that day and went from my room, took my husband's shirt, got up out of bed, took my husband's shirts, and carried them over to my mother's house and hid them, until he got ready to go home. And I happen to see him dodge betwixt the house, crossing from my door to my mother's door. When I went in there I saw where he had dropped one of the shirts.

I asked him, I said, "David, did you take my husband's shirts?" So I got so close in behind him, I said, 'If you don't bring those shirts back, I am going to tell your wife." So finally he did. He went home and got the shirts and brought them back. You know anybody with common sense wouldn't get up out of bed from his bride and steal some shirts.

Q. Now, Mrs. Sanders, can you tell approximately when this was in the year 1954? What month was it? A. I just don't remember what month it was.

Q. Was it the early part of the year or the latter part? A. It was in the summer.

Q. Summer? A. Yes.

119 Q. Do you recall when the defendant was arrested? A. I think it must was in the fall.

Q. Was he living near you at the time? A. No. He was living near Fourteenth Street, I think.

Q. And had you seen him recently, just prior to the time? A. I see him practically every day.

Q. Were there any actions on his part during that time, and I am speaking of the time near when he was arrested, which would indicate any unusual conduct upon his part? A. Whenever you see him he is going in a hurry.

Q. Did you know anything about his drinking habits? A. No, he never drink around me, because he know I didn't approve it.

Q. Do you have information as to whether or not he did drink? A. I heard that he drink. But I didn't never see him drink.

Q. Mrs. Sanders, do you know what is meant by the word "normal," n-o-r-m-a-l? A. Normal? Yes, I do. At least I think I do.

Q. Can you state whether in your opinion a person seems to have a normal mind or an abnormal mind? A. I don't think David ever had a normal mind.

Q. Well, could you relate some specific instances which would

120 lead you to think that he never had a normal mind? A. Well, when he

was small he never act normal. When you get after him he would go running. His aunt would always have to run catch him. And he was from one thing to another, into something. And I feel like, he was normal, he wouldn't do those things.

Q. Well, now bringing it down to after he was grown, can you recall at this time any specific incident? A. Well, whenever you see him, he is walking in a hurry. He never takes his time. And then after he do these things he say he is sorry. Because I always get on him about it. Because I always believe in right --

THE COURT: Just a minute now. Just answer the questions.

Q. (By Mr. Robinson) Just one other question, Mrs. Sanders. In 1954, can you relate to the jury any conduct on the part of the defendant which you would consider peculiar or odd in any way? A. As I say, he never did act right.

Q. No; I mean with respect to the year 1954. If you can't recall any specific things, then say so. If you can? A. No, I can't.

Q. Just relate them to the jury. You have none?

121 A. No, only what I have told you.

THE COURT: She said she can't.

* * * * *

ANDREW PORTER,

recalled as a witness by the defendant, was examined and testified as follows:

MR. ROBINSON: This witness was sworn yesterday.

DIRECT EXAMINATION

BY MR. ROBINSON:

Q. Your name and address, please? A. 1331 Ninth Street, Northwest.

THE COURT: What is your name, again?

THE WITNESS: Andrew Porter.

Q. (By Mr. Robinson) And you know the defendant David Dukes, do you not? A. I know him.

Q. How long have you known him? A. Oh, about, I met him in '53.

Q. Is he related to your wife in any way? A. Well, not personally. I would say no.

Q. How did you come to meet the defendant in 1953? A. Well, we
122 came from Pittsburgh up here and he stayed with me. And I want him to go to school and he wouldn't go to school. I got him a job on an ice truck and he wouldn't work on that. I got him a job where he was working.

Q. Talk a little more slowly. A. I got him a job on an ice truck and he wouldn't work on an ice truck. So I got him a job working with me, out in homes construction, District Heights, Maryland, so he worked out there a while until he got in this trouble.

Q. Now, was he employed with you at the time of his arrest in November of 1954? A. He was.

Q. And how long had he been on that job, prior to his arrest? A. I say probably two or three months.

Q. Now, during this time did he work together with you, closely with you? A. Every day.

Q. Were you in position to see him and observe him? A. Every day.

Q. During this time did he live at your address? A. Well, he did until he got married. And he got married he moved up on Corcoran Street.

Q. During this time that the defendant worked with you, are you able to relate to the jury and to the Court anything peculiar or odd you
123 noticed about his actions? A. Yes. He would go down, he had a room upstairs, he would go out, get the clothes out of the drawer and commence hiding them under the bed mattresses.

* * * * *

Q. (By Mr. Robinson) Anything else that you can relate? A. Well, the boss would give him the truck and tell him to run up the corner and get some cigarettes. He would take the truck and go uptown some

place and come back about four hours without the cigarettes.

Q. Did those incidents happen often? A. Once or twice a week, something like that.

CROSS-EXAMINATION

BY MR. TITUS:

Q. Who did he marry? A. Sir?

Q. Who did he marry? A. I don't know her name.

Q. Where did he get married? A. In the District, I reckon. I don't know.

Q. Was he living with you at that time? A. No, after he got married. After he married he moved up on Corcoran Street.

124 Q. Living with you, he lived with you and your wife? A. That is right.

Q. And your wife, you say, is not related to him? A. As far as I know, she is not.

Q. She is not his cousin? A. Not as I know, she is not his cousin.

Q. And how did he happen to come to live with you? A. Well, you see my wife's mother, and his father's uncle, are all related up there together. You see, my wife was adopted child from my wife's mother. My wife is adopted child to his people's mother. That is why they say they are cousins.

Q. I see. So, in living with you in that close relationship every day, you saw him? A. I was living with him, I seen him every day. When he was working I seen him every day.

Q. You don't know anything about his marriage except the fact he got married? A. I know he said he was getting married. I didn't go to the wedding or reception.

Q. He didn't ask you to the wedding? A. Yes. Sure, he asked me.

Q. Where was that? A. I don't know where he was married at.

Q. Where was the reception? A. I don't even know that.

125 Q. The wife of the defendant, do you know where she is now?

A. I do not.

Q. Have you ever met her? A. Twice.

Q. Do you know her name? A. No.

Q. Her name before she married? A. No.

Q. Was she working then? A. I don't know.

Q. Where did he go to live when he married? A. Up on Corcoran.

Q. Corcoran Street? Did he continue to work? A. With me? He did.

Q. How long was it after he got married that he was arrested for this offense? A. I couldn't say exactly but it weren't too long.

Q. A month? A. Maybe a month or two months, something like that. I wouldn't say exact.

Q. And you say that when he worked at the construction work that you got him, that he would take the truck and go uptown instead of deliver-
126 ing the bricks? A. That is right.

MR. TITUS: Thank you. That is all.

* * * * *

127 MR. ROBINSON: As the Court is aware, the defendant is charged with two other indictments for which he is not being tried. In addition to that there are two other offenses which were not submitted to the grand jury.

Now, ordinarily, the commission of other offenses isn't an admissible subject in the trial of another offense. And it has been in back of our minds, in these events, in view of the sole defense of insanity, that these various facts would indicate a course or pattern of conduct, and we were toying with the idea of bringing those matters in.

Now, the government did not bring the principal officer in this case, I understand Sergeant Sullivan, possibly for the reason that they felt that evidence of other crimes might not be admissible. Actually, the defendant was arrested for another offense than the one with which he is being tried today. And we were wondering about the possibility of introducing evidence as to these other matters in this trial.

128 THE COURT: Do you have any views, Mr. Titus?

MR. TITUS: Well, obviously, Your Honor, there are two other indictments, one of them, I won't go into that. My views would be simply, Your Honor, that we could not. Obviously, the government could not bring in evidence of these other offenses, for the reason, if it please the Court, that it might result in a total prejudice to this defendant.

Counsel, I am sure if they want to go into that, I think it is possibly collateral, but if they feel it has some relation to their defense of insanity, I don't know that I could oppose it.

THE COURT: I don't see how you could. I think it is a matter of your own strategy, Mr. Robinson, whether you think the potential value offsets the potential danger. It is a question upon which I suppose Justice Frankfurter would say you can make an enlightened guess. That is about all you can do, guess, in the light of your own experience. But it is entirely up to you, whatever you want to do.

I will take a recess for a few minutes to see if these witnesses get here.

(End of the bench conference.)

* * * * *

129 JOSEPH FEDORKO

was recalled as a witness by the defendant and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROBINSON:

THE COURT: Go ahead, Mr. Robinson.

Q. (By Mr. Robinson) Your name, sir, is Joseph Fedorko?

130 A. That is right.

Q. And you testified in this case on yesterday; is that not correct?

A. That is correct.

Q. You testified, I believe, on yesterday that in 1954 you conducted certain examinations of slides supplied to you by another person in D. C. General Hospital; is that not correct? A. That is correct.

Q. Do you have an independent recollection as to the date you conducted such examination? A. No, I don't.

Q. Are you able at this time to testify as to the date you did conduct such an examination? A. I don't understand you.

Q. Can you testify as to the date you did conduct that examination? A. No, I can't.

MR. ROBINSON: No other questions.

THE COURT: Mr. Titus.

CROSS EXAMINATION

BY MR. TITUS:

Q. Mr. Fedorko, yesterday you were shown for the purpose of refreshing your recollection a document marked as Government Exhibit
131 No. 4 for identification. Will you look at that, sir, and tell the Court and jury whether that would refresh your recollection as to the date upon which you performed your analysis of these smears. A. I performed many of these smears; maybe ten or twenty a year.

THE COURT: That is not answering the question. Repeat your question.

MR. TITUS: Let me ask this, if I may, Your Honor.

BY MR. TITUS:

Q. This document which you have before you, which is Government No. 4, will you look at that and tell whether or not that is in your handwriting. A. Yes, it is.

Q. Is there a date? A. Yes.

Q. Is that in your handwriting? A. No.

Q. Does that date represent anything to you with regard to the time of your examination of these specimens that were given you? A. It represents the date the slide was smeared.

Q. The slide was smeared. Did you perform your examination on that same date, Mr. Fedorko?

MR. LAWSON: If Your Honor,please, I object.

MR. TITUS: This is cross-examination, Your Honor.

132 MR. LAWSON: Your Honor, the nature of this witness, and his presence here, I think there is only one question, which we asked him, and I think he is limited under the circumstances of this case to that

one question. Naturally, he would have wider latitude on cross-examination.

THE COURT: Will you, Madam Reporter, read the question.

(The last question was read by the reporter.)

THE COURT: I will overrule the objection.

BY MR. TITUS:

Q. Could you answer that, Mr. Fedorko. A. I can't say. Not necessarily. It might have been; all depends on when this examination was conducted by the doctor. The laboratories close in the afternoon, at 4:30.

Q. What is that particular document that is before you there? A. It is a request for an examination.

Q. And who is that request made by? A. It is made by the physician who made the slides.

Q. Does that indicate what physician made that request? A. Yes, it does.

Q. Who is that? A. Doctor Cohen.

Q. Doctor Cohen? A. Doctor Cohen.

Q. Does it indicate the patient or the person whose slides are

133 being examined by you at that request? A. Yes, it does.

Q. What person is that? A. Ruth Davis.

Q. Now, sir, did you testify, or did you make the statement yesterday in your examination that you performed those tests on the 14th of November? A. I don't think I made such a statement.

Q. You do not think you made such a statement. What is the procedure, Mr. Fedorko, when an examination of the type that you made in this case is requested of you? How is that done? Does the doctor call you personally?

MR. LAWSON: If Your Honor please, I object. May we approach the bench?

THE COURT: You may.

(At the bench:)

MR. LAWSON: If Your Honor please, this is the crux of our case.

I understand what Mr. Titus is properly trying to do. But here this man has testified that he has no independent recollection. He has made a mistake, because the record clearly says he said 14th. Now he says he doesn't think he said it. I think that is enough to grant a mistrial under the circumstances of this case. He is confused. He doesn't know. Suppose Mr. Titus gets him to say the 14th. He has said he has no independent recollection. He has said that he didn't say it. We are
134 just confusing it. And I think Your Honor ought to grant a mistrial.

THE COURT: Did you want to add something, Mr. Robinson?

MR. ROBINSON: The witness also testified that the date "11-4-54" was not in his handwriting. He did not make that entry.

THE COURT: Anything more?

MR. ROBINSON: No.

THE COURT: I don't conclude that the date of the examination is conclusive as to the admissibility of the evidence if the government establishes that this was in fact the smear of the complaining witness made as a result of the medical examination which is represented by Government Exhibit No. 3. I think the Court is required to permit the government to show that this defendant did in fact make this examination of this smear. I think if the government establishes that this record was kept in the regular course of business, it would then be admissible.

MR. LAWSON: Even though it were ten days later?

THE COURT: Even though it were ten days later. I don't think that the date of the examination would be material unless it would have some medical significance, which I understand it does not on smears; that if the government shows that the record was maintained in the regular course of business, I don't think that the date of the examina-
135 tion would be material. I will then, for the record, overrule your objection, Mr. Lawson.

MR. LAWSON: If Your Honor please, you are just overruling the objection; not passing on the motion for a mistrial?

THE COURT: That is right; at this time.

(End of the bench conference.)

THE COURT: Go ahead, Mr. Titus.

Q. (By Mr. Titus) Mr. Fedorko, this document which is before you marked Government Exhibit No. 4, is that a document kept in the routine or ordinary course of business at the hospital? A. Yes, it is.

Q. And I was asking you at the time of the objection what the course or procedure is of a request to you to perform such an examination. Will you describe that. A. The request, along with the slide, is brought over by messenger.

Q. From whom? A. I can't say. From the admitting office.

Q. Is it from the requesting doctor?

THE COURT: Answer the question. A. Yes, sir.

136 Q. (By Mr. Titus) From whoever the doctor is that orders it?

A. That is right.

Q. And that is the routine procedure? A. Yes, sir.

Q. Then, sir, after you have performed your analysis of those particular slides, do you make notations on that record which appears before you, Government Exhibit 4? A. Yes.

Q. And is that the result of your finding? A. That is right.

Q. What is done with that particular document after you have made your results apparent on it? A. Sent back to the admitting office.

Q. To the admitting office of the hospital? A. That is right.

Q. And it is maintained there as a document in the ordinary course of the hospital's business? A. That is true.

* * * * *

REDIRECT EXAMINATION

BY MR. ROBINSON:

* * * * *

137 Q. Now, is it the customary practice at the hospital to conduct slide examinations of specimens ten days after an indication that they have been delivered to you? A. No.

* * * * *

RECROSS-EXAMINATION

BY MR. TITUS:

Q. Are those examinations conducted sooner than in the usual practice? A. They are usually conducted the following day. If it occurs
138 in the morning, the examination can be conducted that day.

Q. The same day or the following day? A. The same day that the physician examines or makes a slide in the morning.

Q. If he makes the slide in the morning, then your examination is performed that same day? A. That is right.

* * * * *

139 (At the bench:)

THE COURT: Mr. Robinson.

MR. ROBINSON: The defense does rest, and we renew our motions which we made at the conclusion of the government's case for a directed verdict of acquittal and we move also, in light of the testimony of the last witness, Doctor Fedorko, that the Court declare a mistrial based on the discrepancy of the examination of the slides.

MR. LAWSON: Your Honor, may I say, if I understand Your Honor's ruling before on this motion for a mistrial, Your Honor said it would hinge upon whether the practice is customary. It is clear-cut this man's practice in this case was not customary. So you have the practice not being customary, and you have the uncertainty of his testimony; which meets all the objections, I think, to which Your Honor properly had in mind.

THE COURT: I think, Mr. Lawson, the testimony indicates that the witness Fedorko had no personal recollection of the examination. He testified that Government Exhibit No. 4 was a record kept in the regular course of business, that it pertained to the examination of cervical and urethral smears of Ruth Davis which had been requested on November 4th, 1954. The stipulation relating to Government Exhibit No. 3 indicated that some time at approximately 2:30 a. m. on November 4th, at D. C. General Hospital, the complaining witness had been examined and that these smears

140 had been taken. The witness testified that his examination of the smears disclosed positive for sperm in the cervical area. I think upon that ground that the testimony, that is, Government Exhibit No. 4, is admissible in evidence. I believe I must deny your motion for a mistrial.

I believe, with reference to your motion for a judgment of acquittal, that at this stage of the case there is created a factual issue for the jury, that does not amount to such a preponderance of the testimony as would justify the Court in saying that the Court should direct a motion for judgment of acquittal either upon the record or by reason of insanity. I think that I am required to deny the motion.

(End of the bench conference.)

THE COURT: You may proceed, Mr. Titus.

DAVID J. OWENS

was called as a witness by the government in rebuttal and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

Q. Doctor, don't look at any papers until the appropriate time comes in court. State your full name, please, sir. A. David J. Owens.

Q. And your last name is O-w-e-n-s? A. That is correct.

141 Q. And, Doctor Owens, are you a doctor of medicine? A. Yes, I am.

Q. And are you specializing in any field? A. Yes, I am.

Q. What is that? A. Psychiatry.

Q. And where are you presently attached? I mean, to what hospital? A. St. Elizabeths Hospital.

Q. How long have you been with St. Elizabeths Hospital, Doctor Owens? A. Since June of 1955.

Q. Are you a psychiatrist, then, Doctor Owens? A. Yes, I am.

Q. Doctor Owens, what is your background with regard to your specialized field of psychiatry, educationwise and experiencewise?

A. Limiting it to psychiatry?

Q. Q. Well, start with medicine and then into psychiatry, if you will. A. I finished Medical College of South Carolina, 1948. Following that I had a year's rotating internship, Medical Center, Jersey City, New Jersey. Then I was in private practice, general practice of medi-

142 cine, for approximately three years, at which time I went into the army. I was a captain in the Medical Corps for two years, being discharged in June of '55. At that time I began specializing in psychiatry. I completed my residency training in 1958 and have been on the staff of St. Elizabeths, attached to the west side service of the maximum security section since that time.

Q. Did you have training at the George Washington University Clinic? A. Yes, I did.

Q. Field of psychiatry? A. For approximately a year.

Q. And are you a member of the District of Columbia Psychiatric Society? A. Yes.

Q. Are you a member of the St. Elizabeths Medical Society in the field of psychiatry? A. Yes, I am.

Q. Have you testified as an expert and been accepted as such by these courts? I am speaking of the courts in the District of Columbia. A. Yes, I have.

Q. On many or few occasions, Doctor? A. Many.

MR. TITUS: Your Honor, I would submit the qualifications of this witness as an expert in this field.

143 THE COURT: You may proceed.

Q. (By Mr. Titus) Doctor Owens, I want to direct your attention to the defendant in this case, David Dukes, seated here at counsel table between his lawyers. I want to ask you first, sir, are you familiar with that particular defendant? A. Yes, I am.

Q. Was he a patient at any time at St. Elizabeths Hospital, Doctor Owens, while you were at that particular hospital? A. Yes, he was.

Q. Do you know, sir, the date of his admission to that hospital? A. May I refer to the notes?

Q. You have no independent recollection of it? A. In 1954; I don't recall the exact month or the date.

MR. TITUS: May the witness refresh his recollection from his notes as to the date of admission, Your Honor?

THE COURT: He may.

THE WITNESS: May 25th, 1955.

Q. (By Mr. Titus) May 25th, 1955? A. Yes.

Q. And does the record indicate the date of his release from the hospital, Doctor Owens? A. Yes.

Q. What date was that? A. February 27, 1959.

144 Q. During the period of time, about four years, that he was at St. Elizabeths Hospital, did he come under your personal observation and treatment? A. Yes, he did.

Q. On how frequent occasions, Doctor? A. Very frequently.

Q. Would it be once a week or more than once a week? A. On average, I would say at least once a week.

Q. And that was during the entire time he was there? A. Most of the time, yes.

Q. Doctor, I want to ask you this question, sir: Are you familiar with the crimes charged in the indictment which is presently on trial at this time regarding the defendant David Dukes? Are you familiar with the nature of those crimes? A. Yes.

Q. Are you familiar, sir or let me put it this way: Did you know those offenses were November 4, 1954? Were you able, Doctor Owens, to form an opinion as to the mental condition of this defendant David Dukes on the date of November 4, 1954, sir? A. Yes.

Q. Will you tell the jury, first, what your opinion is as to his mental condition on that date. A. I feel that he was suffering from a

145 sociopathic personality on that date.

Q. Now, would you explain to the Court and the jury what is a sociopathic personality, Doctor Owens. A. A sociopathic personality is an individual who behaves in an antisocial way. He acts out impulsively

without any regard for the consideration of others, displays very little guilt, fails to learn from experience. By that I mean one crime, punishment for that does not necessarily keep him from committing the same offense at a later date. He fails to learn from experience. Usually these particular type of personality disturbance date back to early childhood, continuing throughout the individual's life. Their main symptom being that most of their behavior is in an antisocial way. They do not abide by the laws of society.

Q. Now, Doctor Owens, did you become familiar with the fact that the defendant David Dukes was diagnosed by Doctor Gordon as having a psychosis undifferentiated type in November 25, beginning in November 25, 1954? A. Yes, I was.

Q. What is your opinion, sir, as to the element of psychosis in this particular patient as of that date? A. I am not sure about as of that date.

Q. Or any subsequent time. As to its origin, Doctor. A. I feel that this individual was a sociopathic personality and quite often a

146 sociopath will become psychotic under stress, or stressful situations, such as confinement.

Q. Is that called prison psychosis? A. Very similar, yes.

Q. Do you feel that was a situation here? A. Yes, I do.

Q. Now, Doctor, sociopathic personality which you have described is a mental disease, is it not, Doctor? A. Yes, it is.

Q. In your opinion, compared to a psychosis or a neurosis, in degree of seriousness, how does a sociopathic personality rate? Which is the more serious type? A. This is difficult to answer, because it depends on each individual. One individual may be a neurotic and be extremely ill, and the psychotic individual may not be very ill, as a result the neurotic individual would be much sicker than the psychotic.

Q. How about sociopathic personality? A. I think sociopaths are ill, but I don't think that they are classed as being, generally speaking

now, this is not speaking of any individuals, but just generally speaking, the consensus of opinion is that they are not as sick as psychotics.

Q. Now, Doctor Owens, as you have indicated, you are familiar with the nature of the offenses charged in this indictment, specifically
147 the crimes of robbery and rape on November 4, 1954. In your Opinion, Doctor, would you tell the Court and jury whether you feel these crimes allegedly committed by this defendant were the product or caused by the mental disease called sociopathic personality which you say he had on that date. A. No, I do not think so.

Q. You do not think they are the product or caused by that mental disease? A. That is correct. I feel that he was mentally ill but the crime was not caused by the illness.

Q. In productivity? A. That is correct.

Q. Do you feel, from your examination of the defendant David Dukes, Doctor, that on the date of November 4th, 1954, the defendant knew right from wrong? A. Well, in my opinion he was suffering from a sociopathic disturbance at that time, which is a mental illness. However, this is not, in certain individuals, depending upon the severity of the illness, this does not impair their judgment to the extent that they cannot distinguish between right and wrong.

Q. Will you say therefore he could? A. In my opinion I feel that this individual could distinguish between right and wrong and that his severe mental illness, psychotic condition, occurred following his con-
148 finement.

Q. Following his confinement? A. That is correct.

MR. TITUS: Your witness.

CROSS EXAMINATION

BY MR. ROBINSON:

Q. When was the defendant first examined by the staff at St. Elizabeths Hospital, Doctor Owens? A. He was first, the date of his admission he was seen by one of the physicians on the service which was May 25th, 1955. His diagnostic conference was in September 1955 when he was examined by the staff.

Q. Were you in charge of his case during the stay at St. Elizabeths?
A. There is no one physician that is in complete charge of any one case. All of the physicians on the service, particular service where the patient may be, see and examine each patient.

Q. Did you present the report to the diagnostic conference?
A. No, I did not.

Q. What was the nature of the treatment given the defendant during those four and a half years? A. Mr. Dukes had extensive treatment throughout his hospitalization. He had individual therapy for a period of
149 approximately five months, or six months, by one of the physicians on the service. During his entire hospitalization, which was approximately four or four and a half years, he was in group therapy, which I was in charge of this group for a period of approximately a year and a half, I would estimate. In addition, he was treated also with some of the milder forms of tranquilizing medications.

Q. During your examinations of the defendant were you able to obtain any of his prior history? A. Yes, I was.

Q. Will you relate some of that briefly, sir?

MR. TITUS: Your Honor, may we approach the bench at this time?

THE COURT: You may.

(At the bench:)

THE COURT: I assume Mr. Titus is apprehensive of what the doctor is going to make reference to, the other times in the other indictments.

MR. TITUS: Very much so.

MR. ROBINSON: That is the difficulty, Your Honor. Actually, his testimony is based upon that, you see. It is a very peculiar thing.

THE COURT: It is entirely up to you, if you want to permit him to testify to that. I assume in answer to your question that he is going
150 to go into that. But I think Mr. Titus was being cautious in your behalf.

MR. TITUS: Since he is a government witness.

MR. ROBINSON: I will strike that question.

THE COURT: Very well.

(End of the bench conference.)

THE COURT: Counsel has withdrawn the last question, Mr. Witness.

Q. (By Mr. Robinson) Doctor, let me ask you this question: Were you able, in the course of your examinations, to obtain some of the defendant's history relating to his early childhood? A. Yes, I was.

Q. And could you relate some of that briefly? A. This patient was born in Pittsburgh in 1934. He was apparently fairly happy until the death of his grandmother who he had a very close relationship with. Following this, his difficulties really began. That is, his antisocial difficulties. He began running away from home, progressively became worse. Began stealing. Was a truant from school. Wouldn't remain home. Began getting picked up by truant officers, the police, spent four years at a Pennsylvania state school for boys. Began drinking alcohol at thirteen. The age of fourteen he migrated to Washington,

151 obtaining odd jobs wherever he could find it. Had difficulty eating, sleeping; it was more or less looking out for himself. He had no one to protect or care for him even in his childhood. He was involved in frequent fights as a result of this going from place to place. I think in a period of about, since between the age of ten and twenty he spent approximately six years confined in institutions for these antisocial acts that he had been committing. This was early childhood, the history.

Q. Did the hospital conduct any pathological examination of the defendant? A. Did you say psychological or pathological?

Q. Pathological. A. I am not sure what you have reference to.

Q. Were any tests made of the brain, or any brain-wave tests made and so forth? A. I do not think an electro-encephalogram was made.

Q. Were you able to determine any history of injuries to the head? A. We had none.

Q. The diagnosis which you related to the Court, was that made at his admitting conference or at a later date? A. It was made at the admission conference.

Q. And I believe you have testified that in your opinion he was
152 suffering from a mental illness? A. That is correct. He was suffering from a mental illness.

Q. And is it your testimony also that he was suffering from a mental illness as of November 1954? A. That is correct. I feel so.

Q. Would you say this condition antedated November 4th, 1954? A. I think that he has had this mental illness or this sociopathic personality since he was a child, because of the particular symptoms or behavior that I described; such as getting in difficulties as a child, unable to adjust in the home or anywhere, migrating from place to place, being truant, constantly being in difficulties with the law. This all fits the pattern of a sociopathic personality and I feel that this condition had existed since early childhood.

Q. Did you find any evidence of psychosis? A. I am sorry?

Q. Did you find any evidence of a psychosis with respect to the defendant? A. Yes.

Q. And what were your findings in that regard? A. There was evidence of hallucinatory and delusional experiences when he was admitted. There was blocking, which was an inability to relate verbally his thoughts to the physicians examining. He was extremely suspicious of
153 others around him. His affect, or emotional tone, or quality of his emotions were inappropriate.

Q. Did you find any evidence, sir, of neurosis? A. No.

Q. During his confinement at St. Elizabeths Hospital, after he left D. C. General, did you find any evidence of a prison psychosis? A. Would you repeat that question, please. During -- repeat it.

Q. While he was a patient at St. Elizabeths, was there any evidence

of a prison psychosis? A. Yes. I feel that this psychosis that he had was similar in type to the so-called prison psychosis.

Q. Did you testify as to the approximate time, this question may not be answerable, but is there a specific time in which you can state that a prison psychosis could develop? Within some specific period of time? A. It is difficult to say. However, I feel that, generally speaking, in this particular case, it usually comes on after some stress or stressful situation is brought about on the individual.

Q. This so-called prison psychosis is not the only factor which entered into your diagnosis; is that correct, Doctor? A. No, it was not.

154 Q. Now, I believe you testified that the diagnosis was made at the time of the admitting conference; is that correct? A. The official hospital diagnosis; that is correct.

Q. What was that made? A. I am sorry?

Q. And what was that date? A. September 22nd, 1955.

Q. In response to a question by the United States Attorney, I believe you testified, Doctor Owens, that in your opinion the crimes with which the defendant is charged were not products of his mental illness; is that correct? A. That is correct.

Q. Would your opinion be different had you examined the defendant, say, in November of 1954? A. It is possible that it could have been.

Q. Do you feel that your opinion which you have related to the jury is based upon the fact that you did not see the defendant until May of '55 and your staff did not reach an opinion as to his mental condition until September of '55? A. I don't think my opinion is based on any one particular part. My opinion is based mainly on everything about this individual that I was able to learn about him dating back to childhood, including what information that I could obtain from other physicians who had examined him from family or relatives or from the patient himself.

155 Q. Do you feel that the lapse of time, from November of '54 until September of '55, had a bearing upon your diagnosis and your opinion? A. This is an important thing, to see an individual as soon as possible,

to make a determination, and there was a lapse of a considerable period prior to my examination. And this would have had a bearing.

MR. ROBINSON: You may examine.

REDIRECT EXAMINATION

BY MR. TITUS:

Q. Did you, in making your decision as to your opinion, take into consideration all of the elements that have just been asked you by the defense counsel? A. Yes, I did.

Q. Including the time, the lapse of time from the alleged crimes? A. Yes.

Q. Now, Doctor Owens, you were asked by defense counsel concerning the onset, the customary or usual onset of a prison psychosis, and your answer was that generally speaking after some stress or stressful situation is brought about on the individual. Would that be such as confinement in a jail cell? A. That would be one of the things, yes.

156 Q. And the knowledge on the individual's part that he is being held for a crime that he committed? A. That is correct.

Q. And that would bring about the psychosis? A. It may.

Q. And in your opinion, in this case, such a stressful situation brought about the psychosis you found? A. That is correct.

MR. TITUS: That is all.

THE COURT: Anything further, Mr. Robinson?

RECROSS-EXAMINATION

BY MR. ROBINSON:

Q. I believe you have also testified, Doctor, that you found evidence of psychosis which, in response to a question I asked, antedated the time of his arrest in November of '54; is that correct? A. No. We found evidence of psychosis after he was admitted to St. Elizabeths. I could not say when the exact day or approximate date the psychosis did develop in him.

Q. But I believe you testified that in your opinion his mental condition existed prior to November of '54? A. That is correct.

Q. And is the diagnosis and opinions which you have given to the Court today, did they continue throughout his stay until his release in February of this year? A. That is correct.

157 MR. ROBINSON: Thank you.

MR. TITUS: Your Honor, I must ask another question now.

REDIRECT EXAMINATION

BY MR. TITUS:

Q. You answered the question, just a moment ago, that you testified that his mental condition existed back to childhood. Are you referring to the so-called sociopathic personality? A. That is correct.

Q. Not the psychosis? A. Not the psychosis. But the sociopathic personality condition existed.

Q. And these crimes were not the product of that sociopathic personality; is that correct? A. That is my opinion.

THE COURT: Anything more, Mr. Robinson?

MR. ROBINSON: No, Your Honor.

THE COURT: You may step down, Doctor. You may be excused.

(The Witness stepped down.)

THE COURT: Is there any further testimony, Mr. Titus?

MR. TITUS: One rebuttal witness.

158 CHARLES MACKEY

was called as a witness by the government in rebuttal and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

Q. Would you state your full name, please, Officer. A. Charles A. Mackey.

Q. And your rank, sir? A. Detective sergeant.

Q. Attached to what precinct? A. No. 9 precinct.

Q. And before you were attached to No. 9 precinct, Sergeant Mackey, were you attached to any other squad or division of the Metropolitan Police Department? A. Yes, sir. I was with the sex squad.

Q. For how many years, approximately? A. About six years.

Q. Sergeant Mackey, I want to direct your attention to the month of November 1954, were you attached to the sex squad at that particular time? A. Yes.

Q. And in performance of your duties, sir, did you have occasion at any time during that month of November 1954 to see the defendant in this case, David Dukes? A. Yes.

159 Q. Do you recall approximately the day when you first saw him during that month of November 1954? A. Yes, sir. It was in the evening hours, I think it was November 24th.

Q. November 24th? A. Yes, sir.

Q. Do you recall, sir, whether it was three days after his arrest, or was it the same day of his arrest? A. The same date of his arrest.

Q. The same date of his arrest? A. Yes, sir.

Q. Now, did you at that time, and just listen to my question, Sergeant, did you at that time or any subsequent time to the day of his arrest have occasion to converse with him or talk with him at all?

A. Yes, sir.

Q. Did you talk with him for any long period of time? A. Yes, sir.

Q. Approximately how long? Just in time. A. Several hours.

Q. Several hours? A. Yes, sir.

Q. Did you during the course of that time, Sergeant Mackey, observe the actions of the defendant on the date of his arrest? A. Yes,

160 sir.

Q. Did you observe his reactions to questions and to situations?

A. Yes, sir.

Q. Would you give us your views, Sergeant Mackey, as to whether during that period of time that you saw and talked with this defendant, the date of his arrest and subsequent thereto, whether the defendant evidenced any irrational behavior or irrational conversation or in any way acted in an insane manner? A. No, sir. He acted normal.

Q. Was he, sir, in response to any questions asked him, responsive to those questions? A. Yes, sir.

Q. Did he in your opinion appear to know what was going on around him and what people were talking to him about? A. Yes, sir.

Q. Was that attitude of the defendant apparent on the date of his arrest to you? A. Yes, sir.

* * * * *

163 THE COURT: Does the defendant request any special charge?

MR. ROBINSON: I think Mr. Lawson brought out one, when we were up here once before, concerning --

MR. LAWSON: The alternative. The testimony was that this could have been or could not have been the product. Doctor Gordon said it could or could not have been the product. And this Doctor Owens testified that sociopathic personalities were mental illnesses; notwithstanding that there was no productivity here. But I think, put in that context --

THE COURT: The Court will charge the jury, in what I think is regrettable length, on the subject of sanity as a test of responsibility for criminal acts. I will use the essence of the Durham case, plus the four or five addendums thereto, in defining mental disease and disorder,

164 and will point out that in addition the mental disease or disorder must be in causal relationship with the crime.

I will not comment upon the testimony of the expert witnesses. But I will advise the jury, of course, that they are not bound to accept the testimony of any expert witness. I will tell them that they should not arbitrarily reject the testimony of an expert witness but should consider all of the reasons given by a witness for his opinion; his experience, his background, his qualifications, his opportunities to observe the patient and so on; and give his testimony such weight as they think it is fairly entitled to receive.

The Court also proposes to, in addition to all of the customary elements of a charge in a criminal case, point out that no presumption of guilt arises against the defendant because of his failure to take the stand.

I believe under the circumstances of the case that I am required, with reference to the second count of the indictment, to afford the jury the opportunity of returning a verdict of either guilty as charged or guilty of assault with intent to commit carnal knowledge or not guilty. In other words, I will charge on the second count on the lesser crime included in the greater.

Is there anything further that the defendant wants by way of special charge?

MR. ROBINSON: I had instructions on that issue of insanity. I
165 imagine your instructions would cover it.

If you are not going to charge before Monday, I will have it here.

THE COURT: You may submit your charge on insanity on Monday morning. And if there is anything included in it, which the Court considers proper which is not in the Court's charge, I will augment the Court's charge by adding whatever you have in yours to it. Do you request anything other than the items that we have discussed here?

I will not charge specifically with reference to any item of evidence because it is not my policy to single out individual items of evidence and comment upon them, because I think it places them in too prominent a degree in the minds of the jury.

I will tell the jury that the exhibits which the Court has admitted in evidence are available for their examination if they want them sent into the jury room. But that is about as far as I go in commenting on exhibits. Mr. Titus, you were going to make a further request?

MR. TITUS: I didn't mean to interrupt the Court.

THE COURT: It is perfectly all right.

MR. TITUS: I was simply going to ask Your Honor, in instructing or telling the jury as to what they may return in regard to the second
166 count of the indictment, if Your Honor will also tell them they may bring in the recommendation of a death penalty.

THE COURT: I will read the statute to them and point out, of course, that the statute provides, if the jury believes a death penalty

is proper, they may recommend it.

If counsel thinks of anything else between now and Monday morning, I will give you an opportunity at the bench before you start your closing argument.

* * * * *

[Filed October 2, 1959]

168 Washington, D.C.,
Monday, June 29, 1959

The above-entitled cause came on for further hearing before THE HONORABLE EDWARD A. TAMM, United States District Judge, and a jury, at 10:11 a.m.

* * * * *

171 MR. ROBINSON: Your Honor, I just talked with the defendant in the cell block and it was my understanding Friday he was not going to take the stand. He told me this morning he wanted to take the stand. Of course, we have rested our case now.

THE COURT: Well, I don't know that the Court can do anything but permit you to reopen the case if you want to put him on the witness stand.

MR. ROBINSON: That isn't my idea.

THE COURT: Very well. If you want to put him on, go ahead.

(End of the bench conference.)

* * * * *

DAVID DUKES,

the defendant, called as a witness in his own behalf, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROBINSON:

Q. Will you give your name. A. David Dukes.

Q. Speak into the microphone, Mr. Dukes. A. David Dukes.

Q. And where are you living presently? A. At the D.C. Jail.

172 Q. And how long have you been there? A. Either February or March, one of the two.

Q. And where were you prior to February or March of this year? A. I was in jail. I was in jail.

Q. You were in jail prior to February? A. Before I went to jail?

Q. Yes. A. Oh, I was in the hospital.

Q. Do you know at this time how long approximately you were there? A. About four and a half or about, around four or four and a half years, I guess.

Q. Do you know now why you were sent to the hospital? A. Yes, I do.

Q. At the time you were sent there did you know? A. No, I didn't.

Q. Now, you have sat here Thursday and Friday and heard various witnesses on behalf of the government testify as to certain matters. Do you recall any of the incidents which they spoke about? A. My cousin, I --

THE COURT: Keep your voice up. A. My cousin, I recall some incidents that she spoke about.

173 Q. Do you recall where you were living at the time you were arrested? A. 1418 Swart Street, Northwest.

Q. Were you married at the time? A. Yes, I was.

Q. And were you living with your wife at that time? A. Yes, I was.

Q. Do you recall how long you had been married? A. Around seven or eight months.

Q. You know how long you have lived in the District of Columbia? A. About seven or eight months. When? How do you mean?

Q. The length of time you have lived in the District of Columbia? That is, all your life, if you know. A. I was in the District a long time

ago. A long time ago. I don't know how long exactly I stayed there.

Q. Where else have you lived? A. Pittsburgh, Pennsylvania.

Q. I believe you heard testimony from your aunt and the doctor from St. Elizabeths Hospital concerning certain events which took place in your life? A. Yes, sir.

Q. Can you explain to the Court and the jury concerning those things as you remember them? A. I was born in Pittsburgh, Pennsyl-
174 vania; and started to school in Pittsburgh. I was living with my grandparents, at least I thought they were my grandparents. My cousin said that they wasn't, so I didn't know. And I was living with my brothers and sisters were there. I think there were seven or eight of us in the family.

And at that early, at that early time I believe that when I started to school, my parents died. Otherwise my mother, my grandmother died, at least I thought she was my grandmother.

And after that, I was sent to a reform school in Pittsburgh, Pennsylvania, for not going to school and running away from home, so they said. But it wasn't exactly -- I did go to school but I didn't run away from home. They said that my grandfather was the only one living at the time and my sister, who I thought was my sister but was my mother, I never knew she was my mother, she -- well, anyhow, at that time my father, he didn't get married, but he was going with another woman, and I was staying at Webster Avenue by myself, at the home by myself, and during that time I didn't have nobody to look for for anything.

And my father, who was supposed to love me, or whatever the word used, he was with this woman most of the time when I was small. And I used to run out, go out with a bunch of fellows, because this was the only way I could have consolation, this was the only way I was accepted, with
175 another bunch of boys. And I guess we got into difficulty three or four times. And went to juvenile court, I guess, around nine or eight times. I don't think it was for stealing, but not going to school.

And I, strange things seemed to occur at the time when I was young. I used to get a lot of satisfaction, or gratification, as I would

plunder a few things in the house. This is understanding I have got since I have been to the hospital, by going through therapy; that I used to get a satisfaction out of this. I used to seek things, go through the house or go in the basement.

And many times I would go to sleep in my own room, in my own home, and wake up the next morning or either late that night and find myself next door either sleeping in the hallway or either sleeping on top of a roof, and not knowing how I got there, but, I mean I never think anything else about it.

And so it's -- so after I went to the institution and I got out, my mother died, either she called me down there.

And at this same time my mother used to accept the things that I used to go downtown and shoplift with the rest of these boys. I used to bring it to her. At that time I thought it was probably a great gift. I thought it was something I was doing great, because it was accepted by her. And she would tell me, it's a nice thing, or whatever I would
176 bring her, a bracelet or a dress or something like that, she would say it was a nice thing. And I felt proud of myself for this.

And so actually I began to go to school, and after I got out of the institution, I got into other difficulty, although I think I was put into a foster home. I was taken out of the school and given tests and things like that and put into a foster home.

And I think I stayed in this institution about, the same institution, I guess, about two years and a half this time. And I have gotten out, which I come here to Washington. And I left Washington. I was, I think -- I don't know how old I was. I left Washington and went back to Pittsburgh. Of course for about a year or maybe six or seven. I went back to Pittsburgh, I had nowhere to stay and so I would just stay in cars or trucks or anywhere that I would find it more convenient for me.

And at these times I would, wouldn't be heading towards the home where I used to live, but at times I used to wake up and find myself on the steps where I used to live at, and this was constantly happening. I

mean, I don't know if you use the word "frequently" or what word you would use. But it would always happen. I would usually find myself on the steps where my parents lived.

177 And afterwards, when I would go back, my mother died, she told me, I think it was on a Mother's Day or something, my sister, at least I thought she was my mother at the time, I thought she was my sister, she told me that she was my mother, and I don't know what effect it had on me or how it was.

Well, anyhow, I never had anywhere usually to stay. I would come here to Washington and I would go back to Pittsburgh. I would get into difficulty. I would find myself, I couldn't hold a job. And I seemed like to myself there was something -- other people were strange to me. Other people, they wasn't like human beings, or someone that had feeling for maybe, emotions or something like that. I thought people was something from another world and I was in here because I would get no response. And many times, the reason why I say this is, I went, many times when I was on a bum or I didn't have no place to stay, I would go by the house that the woman, my grandmother had married, several times and ask for something to eat. And she would tell me that she wouldn't give me anything to eat and don't I -- my people here was going to take it to court to try to see if they could get some money off my grandfather's death, and she would continuously tell me she won't give me anything and I would take it to court.

And I went to juvenile court several times while I in this condition

178 and asked them for help and I asked them to lock me up and they refused and say I am not under their jurisdiction, or I guess I was a juvenile at the time. And they refer me to a loan company to borrow money from. And the loan company said I had no one to vouch for me and I am not old enough and so --

I heard the doctor speak about head injury, I supposed to have fallen off a truck. This happened during the time, when my grandfather was living, I think. And I remember there was a bunch of us kids, we

were hopping trucks, and the last time I remember is leaning off the side of the truck. And the next time I remember was the next day, which some boys told me I had fallen off a truck and my head was hit by a telephone pole. And right after that I used to suffer with headaches and I had nose hemorrhages. My people here took me to several hospitals here for these nose hemorrhages. One doctor would say I have a rheumatic heart disease and the other one say, I don't know what he say about my nose, sinus or what he would say.

And it's strange -- Otherwise, things to me as of now seem strange. It doesn't seem like a part of me; even though it is the things that have happened all in the past, and even the charges that I am charged with, and by the woman getting up here and explaining those things, it is a very embarrassing thing and it doesn't really seem like a part of me. It doesn't seem like I could at any time go out and try to ravish

179 or rape or do anything to anyone of that sort, because I never anticipated or not any thought that I could remember or anything of doing anything such as that.

It is just that I guess the hospital helped me the best they could. And of course in my opinion I believe that I still need more treatment. I begin to notice a lot of things about myself and how to straighten things out, and what I have learned by what they call psychoanalysis treatment that they give at the hospital, I learned about a lot of my troubles, why I have a lot of difficulty that I got into. And so it was told to me then and which gave me a great understanding and I was able to see it, that I didn't have the parents or the people that were able to understand my condition at the time, have educational qualifications, didn't allow them, wouldn't permit them to understand my condition. And by this I would go around stealing, is by seeking attention or looking for something. I was looking for some type of attention, love in any form, in any way I could find it. I was, was so seeking some type of -- someone to care for me, even though it is a part of my wife, I found out it was difficulty we have had being married. Not that I

blame it on her, I guess it is probably myself. But as yet, still there was something that I was seeking for, which I have a little understanding

180 now, that I know what I was looking for now.

Now I know. And I understand what it means to have someone to love you or someone to understand you and to understand others as well. I have been in jail, I guess twenty-four now, and I have been in institutions eleven years out of that. I have never been on the street where I could be as anyone normal, as you would call normal, that is one, the way I see people smiling or laughing, and going to their homes and things, and knowing that they have someone there to care for them or someone there to understand them. I know what it means now.

And I have been in, as I say, four years in an institution, and I think that now I have this, partially, of this understanding of what life would mean to me or to others.

And, well, I don't have anything else.

THE COURT: Any further questions, Mr. Robinson?

MR. ROBINSON: No, Your Honor.

THE COURT: Mr. Titus.

CROSS-EXAMINATION

BY MR. TITUS:

Q. Tell us about the night that you committed this act on Ruth L. Davis, do you remember that? A. No, I don't.

Q. You don't recall that at all? A. No, I don't.

181 Q. You remember everything else but you don't remember that; is that right, Mr. Defendant? A. Will you repeat?

Q. You remember all about your early life and on the streets and trouble with the boys but you don't remember that? A. Yes, sir. Yes, I do remember about my past life. All I do not remember.

Q. I am asking you about Ruth L. Davis that testified on the stand. A. I don't remember. I can't remember her or the act when it happened or I don't even remember her when she come up here, the things that she said, it is only that I can't accept them because I don't know.

Q. Where is your wife, Mr. Defendant? A. My wife now, I guess, she is still -- I don't know. My lawyer got a letter from her. Told me about two days ago.

Q. When did your memory about this act fail you? A. When did my memory about this act fail me?

Q. Yes. A. I never remembered anything about this act, truthfully.

Q. You never remembered about this act, Mr. Defendant? A. I never, I never, I never remember anything about this act.

182 Q. Do you recall ever talking to your wife on the phone about this act? A. No, I don't.

Q. You remember that lighter, Mr. Defendant? A. No, I don't.

Q. You remember that watch, Mr. Defendant? A. No, I don't.

Q. Do you remember the Porters, Mr. Defendant? A. The who?

Q. Andrew Porter and his wife. A. He is my --

THE COURT: Keep your voice up. A. A long-distance cousin, or whatever you say, I don't know. I remember like that, I used to live with Mr. Porter and Mrs. Porter.

Q. You remember living with them, do you? A. I remember living with them.

Q. You remember the job he got for you? A. The job he got for me was construction job.

Q. You remember that, do you? A. Yes, I do.

Q. And you don't remember selling a watch to them? A. No, I don't.

Q. All of this that you have been talking about on the stand you

183 have gotten from talking to the doctors over in the hospital; isn't that correct? A. I got the understanding of talking to the others in the hospital through psychoanalysis therapy, four years of it.

Q. Psychoanalysis therapy? A. Group therapy, this four years.

Q. I mean about this understanding and lack of anyone to turn to and all that; you got that from the doctors? A. Yes.

Q. You are parodying what they told you? A. That is right. And I believe it.

Q. And you believe it? A. Yes, sir.

Q. What day were you arrested, Mr. Defendant? Do you remember? A. I don't remember.

Q. You remember it was in November? A. No, I don't. Just only I remember going to the indictment that I have, which I have here. I have an indictment that says November 4th. I remember through that.

Q. Through that? A. Yes, sir.

Q. That is the only way you remember? A. Yes, I do.

MR. TITUS: That is all.

* * * * *

184 THE COURT: Will counsel approach the bench?

(At the bench:)

* * * * *

THE COURT: * * *

Is there any additional charge that the defendant requests?

MR. ROBINSON: No. I think this will take one away.

THE COURT: Very well. You may proceed.

(End of the bench conference.)

* * * * *

208 AFTER RECESS

THE COURT: Ladies and gentlemen of the jury: The introduction of evidence having been completed in this case, the attorneys having made their closing arguments to you, it now becomes the Court's responsibility to instruct you as to the law that will govern you in

209 reaching your verdict in this case.

Remember when you go into the jury room that the closing arguments of the attorneys do not constitute evidence in the case. The statements that these attorneys have made to you this morning are efforts on their part, as advocates, to place the evidence before you in the light that is most favorable to the client that each of these men

represents. Remember also that the recollections of the attorneys are not binding upon you. In other words, if Mr. Titus or Mr. Robinson has referred to any of the evidence in a way that differs from your recollection of that evidence, then you of course disregard the recollection of the attorneys and are guided by your own recollection in the case.

Similarly, if, in the course of my charge upon the law to you, I have any occasion to refer to any of the evidence, and my recollection differs from yours, then you disregard the Court's recollection ot the evidence because it is your recollection, your recollection alone, which must govern you in reaching your verdict in the case.

When you retire to the jury room you will take with you a copy of the indictment which has been returned by the grand jury in this case. The indictment is signed by the United States Attorney. It is signed by the foreman of the grand jury. It is couched or phrased in legal language and it is a rather formidable looking document. The important

210 thing for you to remember, however, is that an indictment is not evidence in a case. An indictment is not proof of any fact. An indictment is merely a formalized accusation which is intended to notify the defendant of the charges which have been preferred against him, the charges which he must answer when he comes into court. Remember, then, that this indictment which you will have before you is not entitled to any probative value in your deliberations.

The indictment in this case charges this defendant with two crimes. The defendant is charged in the first count of the indictment with the crime of robbery. He is charged in the second count of the indictment with the crime of rape.

The first count of the indictment specifically charges that on or about November 4, 1954, within the District of Columbia, David Dukes, that is this defendant, by force and violence, and against resistance, and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession

of Ruth L. Davis, property of Ruth L. Davis of the value of about $41.00, consisting of the following: one wrist watch of the value of $40.00; one cigarette lighter of the value of one dollar.

The crime of robbery is defined in the District of Columbia Code as follows:

211 Whoever by force or violence, whether against resistance or by sudden or stealthy seizure, or by snatching, or by putting in fear, shall take from the person or immediate actual possession of another, anything of value, is guilty of the crime of robbery.

There are, then, three essential elements necessary to constitute the crime of robbery. The first element is the use of force or violence; or the use of means whereby the victim or aggrieved person is put in fear; or by a sudden taking or snatching. There are three different elements or three different ways in which the crime of robbery may be committed; the purpose of this statute being to govern not only the offense where force or violence is concerned, but also situations in which a pocketbook is snatched or something of that kind. So that the first element may be committed in any one of three alternative ways; that is, by the use of force or violence, the use of means whereby the aggreived person is put in fear, or by a sudden taking or snatching.

The second element of the offense is a taking from the person, or immediate actual possession of another, money or other personal property; and the third element is an intent to rob or steal.

The second count of the indictment charges the crime of rape, or carnal knowledge, as it is sometimes referred to in the courtroom.

212 The count, through this count of the indictment, specifically charges that on or about November 4, 1954, within the District of Columbia, David Dukes had carnal knowledge of a female named Ruth L. Davis, forcibly and against her will.

This section of this indictment is drawn under a section of the District of Columbia Criminal Code which provides that whoever has

carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for a period of years.

The statute further provides that in any case of rape the jury may add to their verdict, if it be guilty, the words, quotes, "with the death penalty," unquotes, in which case the punishment shall be death by electrocution.

The section further provides that if the jury fail to agree as to the punishment, the verdict of guilty shall be received and the Court shall impose a specific period of imprisonment.

In a rape case, then, the jury has, within certain limits, the right to determine the punishment. This is a most unusual provision of the law in this jurisdiction, because in virtually all other types of case the jury has no concern with the matter of punishment but, as you have probably heard the Court admonish the attorneys, in cases where refer-
213 ence is made to punishment in the closing argument, the jury is expected to concern itself solely with the question of guilt or innocense. But in this crime of rape or carnal knowledge, you have the right, if you deem it desirable to do so, if you find the defendant guilty of the crime of rape, to add to your verdict "with the death penalty."

Rape is defined in the District of Columbia as having carnal knowledge of a female forcibly and against her will. The words "carnal knowledge" are synonymous with sexual intercourse. In plain language, rape may be defined as having sexual intercourse with a woman forcibly and against her will. Your attention must be directed to this single question as to the second count of the indictment and all extraneous matter must be laid aside except to the extent that it assists you in determining the principal issue in this case, and the second count of the indictment, namely, whether the act was committed and whether it was committed forcibly and against the will of Ruth L. Davis.

In order to justify a conviction on a charge of rape, the female, the complaining witness in this case, must have resisted the act to the

utmost of her physical powers, unless her resistance was overcome by threats which put her in fear of death or grave bodily harm, not just any fear, but fear of death or grave bodily harm.

The law does not permit a conviction on a charge of rape on the
214 basis of the testimony of the complaining witness standing alone. Corroboration of her testimony is required according to the law prevailing in the District of Columbia. Such corroboration, however, need not be by eyewitnesses. Eyewitnesses can hardly ever be obtained in regard to such an offense as is charged in this case. Corroborating circumstances may be sufficient for corroboration. There may be testimony of circumstances which, if believed by you, you may, if you deem it wise and proper, consider in the nature of corroboration. Whether there is corroboration at this point in this case is a question of fact for you to determine.

As I explained to you, the law provides that if the jury finds the defendant guilty of rape, it may add to the verdict the words "with the death penalty." If you find that rape was not committed in this case, but that the defendant assaulted the complaining witness, Ruth L. Davis, with intent to commit rape on her, your verdict may be guilty of assault with intent to commit rape.

Rape is a very grave and heinous crime. But a charge of rape is one that is easily made and is difficult to refute. In such case the evidence must be scrutinized with great care less an injustice be done to the accused. I am going to read to you some observations made on this point several years ago by the Court of Appeals for the District of
215 Columbia.

The Court, in an opinion on a rape case, said, and I quote.

> "The crime of rape is not always easy to establish. It most generally depends upon the testimony of a single witness to the actual or alleged commission of the crime and unless her testimony is beyond question or doubt, or made so by surrounding circumstances,

there is danger in conviction. Hence it is always important to look to the conduct and the character of the complaining witness and the circumstances that may concur or otherwise with her statement of the alleged commission of the offense. The testimony of the prosecuting or complaining witness is always more or less credible according to the circumstances that may concur with her statement of the alleged."

I have just read to you some observations made by our Court of Appeals on the type of evidence that should be required before a verdict of guilty may properly be found on the charge of rape.

The punishment provided by law for rape may be the death penalty, as I have explained to you, or it may be imprisonment for a term of years. The decision whether the death penalty should be inflicted is to be made by you, the members of the jury, if you find the defendant guilty. In other words, you have the authority to determine whether or not the

216 death penalty should be imposed in this case. Consequently, if you find the defendant guilty of rape, you must then decide whether the death penalty should be imposed. If you unanimously reach a conclusion that the death penalty should be inflicted, then you may add to your verdict of guilty the words "with the death penalty." In such case, in case such is your verdict, it will then be mandatory on the Court to impose the death penalty.

On the other hand, if you find the defendant guilty of rape but do not reach a conclusion that the death penalty should be inflicted, then your verdict should be simply guilty without any addition to it. In that event the defendant may be subject to imprisonment for a period of years but he will not be subject to the death penalty.

There is one other factor in this type of case which occasionally causes a jury concern and that is as to the measure of resistance which a complaining witness or victim in a rape case must exercise in endeavoring to avoid the advances of the defendant. Of course if the complaining

witness in a case of this kind consents to the sexual act with the defendant, then the defendant is not guilty of rape unless the victim or the complaining witness is under sixteen years of age, and that is an element which is not in the present case.

217 It thus becomes necessary for the Court to instruct you as to what legally constitutes consent. If the complaining witness freely and voluntarily agreed to perform the sexual act with the defendant, then she consented to the act and there was no rape. If, however, the complaining witness resisted the defendant but was forced to perform the sexual act, then she did not consent. The question, then, is how much force on the part of the defendant is required for you to find that the resistance of the complaining witness was overcome so that she did not consent.

The rule of law which you must follow is that where the woman is induced to perform the sexual act by threats which put her in fear of grave bodily harm or death, or by the exercise of actual force against her person, she did not consent. The complaining witness must resist the attack of the defendant but the law does not require that she resist to the very utmost of her power and ability. Thus, if a defendant threatens to do serious bodily harm or kill a woman, and she fears that he will carry out his threats unless she performs the acts required of her by the defendant, she does not in the eyes of the law consent.

You must consider all the circumstances surrounding the attack in order to determine whether in fact the complaining witness did or did not consent to the sexual act. Consider the time and place of the alleged attack, the relative physical characteristics, such as age, weight and

218 height of the complaining witness and the defendant, the opportunity, if any, of the complaining witness to escape from the scene or to secure assistance in warding off the attack of the defendant, the conduct of the complaining witness at the time of her attack, the presence or absence of deadly or dangerous weapons at the time of the attack, and any other factors which tend to indicate whether the complaining witness did or did not consent to the performance of the sexual act with this defendant.

I have told you, and I am going to tell you again later, that you have several alternative verdicts upon the second count of the indictment. One of your alternative verdicts may be guilty of assault with intent to commit rape.

What is assault? Assault consists in an unlawful offer or attempt with force or violence to do bodily harm to another, coupled with a present ability to carry it into execution.

The law is of course in this case, as it has been and will be in every case in which you participate, that the defendant is presumed to be innocent and the burden of proof is upon the government to prove the defendant guilty beyond a reasonable doubt. As I have said to those jurors who are attached to this court regularly for this month, the presumption of innocence is one of the most important principles of our criminal law. It means in essence that the defendant is not required

219 to prove his innocence but, rather that he is presumed to be innocent until and unless the government removes this presumption by proving to your satisfaction beyond a reasonable doubt that the defendant committed each and every element of the offense with which he is charged. If the government then fails to prove that the defendant has committed each and every element of the offenses with which he is charged, it is your responsibility to find the defendant not guilty.

The burden of proof upon the government, however, is to prove the defendant guilty beyond a reasonable doubt but not beyond a reasonable doubt but not beyond all doubt whatsoever. In other words, the government must prove the defendant guilty to a moral certainty but not to an absolute or a mathematical certainty.

As its name readily suggests, a reasonable doubt is a doubt which is predicated upon reason. That is a doubt for which you can give a reason to yourselves as contrasted with a doubt that may be predicated upon sympathy, upon prejudice, or upon any other emotional factor in your thinking. In the final analysis, however, proof beyond a reasonable doubt means simply this: If after a fair and impartial comparison and

consideration of all of the evidence in this case, evidence offered by the government and evidence offered by the defendant, you can truthfully say to yourselves that you are not convinced of the defendant's guilt, then you have a reasonable doubt and your verdict should be not
220 guilty. If, however, after you make this fair and impartial comparison and consideration of all of the evidence in the case, you can truthfully say to yourselves that you have an abiding conviction of the defendant's guilt, such a conviction as you would be willing to act upon in the more important and weighty matters in the course of your own daily lives, then you have no reasonable doubt and your verdict should be guilty.

In determining whether the government has established the charges against this defendant, you must consider and weigh the testimony of all of the witnesses who have appeared before you. You are the sole judges of the credibility of these witnesses. This means, of course, that you must determine which of these witnesses you will believe and to what extent you will believe them.

In determining how much credibility you will give to the testimony of each witness you have the right to consider the demeanor of the witness on the witness stand, his or her manner of testifying, whether the witness impresses you as having an accurate memory and recollection of the facts about which the witness is testifying, whether the witness displays any favor or prejudice towards the government or the defendant, and whether the witness has any interest in the outcome of the case.

In addition, you have the right to utilize any other of your mental
221 faculties to decide whether the witness is or is not in fact a truth-telling individual, telling the truth on this occasion.

As we pass along what has been described by a poet as life's stony paths, we encounter people every day in situations where we have to decide whether those people are telling us the truth or are telling us a falsehood. Each of us develops certain techniques tested by time and experience by which we analyze a person's statements in

determining whether they are in fact telling us the truth. In other words, all of us have little techniques by which we decide whether we are being told the truth on a particular occasion by a particular person. You have the right in evaluating the credibility of the witnesses in this case to utilize the sum total of all of your experience in dealing with other people and in applying the sum total of that experience to the conduct of these witnesses to determine whether you do or do not believe them or to determine to what extent you believe them.

If you believe that any witness willfully testified falsely as to any material fact concerning which that witness could not possibly be mistaken, you are then at liberty, if you deem it desirable to do so, to disregard the entire testimony of that witness or any part of the testimony of that witness.

222 With reference to the testimony of the defendant, you are instructed that of course he is a competent witness in his own behalf in this case. In determining how much credence, how much credibility you will give to his testimony, you have the right to consider his situation, all of the circumstances which surround him, his interest in the result of your verdict, and you should give to his testimony such weight as in your judgment it is fairly entitled to receive.

In this regard, the defendant has, upon the witness stand, told you that he was incarcerated in a reform school or reformatory type of institution. There was testimony from one of the psychiatrists, I don't recall which, that the defendant had been incarcerated, as I recall the testimony, for an armed robbery. The District of Columbia Code provides that no person shall be incompetent to testify in either civil or criminal proceedings by reason of his having been convicted of crime but such fact may be given in evidence to affect his credit as a witness.

I have explained to the jurors attached to this courtroom that at the common law of England, several hundred years ago, the law was that no one who had ever been convicted of a crime could ever again testify in any case, civil or criminal. Of course our law springs from

the common law of England and that was the rule in the United States
223 during the Colonial days.

It was found, after several hundred years, because the law moves slowly, that often an injustice was done when a person was not permitted to testify because of a prior conviction, because sometimes the only witness to a particular fact might be a person who had been convicted of a crime. Consequently, if the Court and the juror were deprived of the testimony of that witness, perhaps full and complete justice could not be done. So the various states in the United States, and Congress acting for the District of Columbia, have enacted statutes similar to the one I have read to you which says that a person may testify in a civil or criminal case, even though he has been convicted of crime, but the facts of his conviction may be given in evidence to affect his credit as a witness.

This means that these details which you have heard concerning the defendant's earlier criminal experience, or experiences, is not evidence that he committed the offenses charged in the present indictment. You may consider his prior record, this prior criminal record, only in so far as it affects the defendant's credibility as a witness in the present case.

There is in this case an evidentiary item upon which the Court must comment and explain the law to you, and that is the so-called doctrine
224 of possession of recently stolen property. In this case evidence has been introduced by the government, in an attempt to prove that the defendant had, after these alleged crimes were committed, in his posession property which had been stolen from the complaining witness Ruth L. Davis. It is a rule of our law that when recently stolen property is found in the exclusive possession of someone, the jury may infer from the fact of such possesion that the possessor of that property was in fact the thief.

If from the evidence you should be convinced beyond a reasonable doubt that the property here in question was stolen,and that the defendant

soon after its theft was in exclusive possession of it, that is a circumstance to be taken into consideration by you in determining your verdict. Unless such possession is satisfactorily explained, either by the defendant or by the facts and circumstances brought out upon the trial, the fact of such possession is a sufficient basis to warrant your finding the defendant guilty of the crime of robbery.

The Court instructs you, however, that while you are permitted under the law to draw an inference of guilt from the fact that the defendant was discovered in exclusive possession of recently stolen property, you are not required to do so; nor, if you do draw this inference, are you required on that basis alone to find the defendant guilty, although
225 you may do so.

We come now to the defense of insanity which has been offered by the defendant in this case. It is the law, of course, that a person who lacks the mental capacity to know what he is doing, who lacks the mental capacity to possess the intent to commit a crime, will not be held liable by the law for his acts.

In order for you to convict the defendant of the offenses which he is charged in count one and count two of this indictment, you must find that the government has proved beyond a reasonable doubt, not only all of the essential elements of the offenses charged, but also either that the defendant was not suffering from a mental disease or defect at the time of the offense, or, if you should find that he was suffering from a mental disease or defect, that the offense then was not the product of any mental disease or mental defect from which the defendant may have been suffering at the time of the offense.

In this sentence I have used the phrase "at the time of this offense" on two occasions. And that is the vital date as to your deliberations in the case. There is no contest made by the government that after this man's arrest on November 25th he was examined and was found to be suffering from a psychosis, which means that he was suffering from a
226 mental disease. But the question for you to determine in your

deliberations: Was this man suffering from a mental disease or defect on November 4th, 1954, the date upon which it is charged these offenses occurred. What his condition was after that time is of interest only in so far as it is evidence for you to determine what his condition was on November 4th. Remember, then, that in determining whether this defendant was or was not of sound mind, your determination must be as of November 4th, 1954, the date, I repeat, when these alleged offenses occurred.

The law does not hold a person criminally responsible if he is mentally deranged, and if his derangement caused him to commit a crime, but it is not every kind of mental derangement or mental deficiency which is sufficient to relieve a person of responsibility for his acts. On the contrary, a person may suffer a mental abnormality and still be answerable for his unlawful acts.

In order for a person to be relieved of the responsibility for crime by reason of insanity, there are two requirements: First, he must have been suffering from a mental defect or disease at the time of the offense; and, second, his act must have been the product of that mental disease or defect. In other words, there are two elements to this defense of insanity; the element of the existence of a mental disease or a defect, and second, the causal relationship between that mental
227 disease or defect and the crime committed.

The question for you to determine, if you find mental disease or disorder, is: Was that mental disease or disorder the causation of the acts alleged in the indictment. Was the crime the product of the mental unsoundness.

As to the first requirement, that is, whether the defendant was suffering from a mental disease or mental defect, when I say "disease" I mean a deranged or abnormal mental condition, considered capable of either improving or deteriorating. When I say "defect" I mean a deranged or abnormal mental condition which is not considered capable of either improving or deteriorating and which may be either general or the result of an injury or residual effect of a physical or mental disease.

As to the second requirement, the criminal act must be the product of a mental abnormality, this simply means that the act must have resulted from or been produced or caused by the mental disease or mental defect suffered by the defendant, or, to put it another way, that the defendant would not have committed an offense but for his mental disease or defect. For example, if you should find that the defendant committed the offenses robbery and carnal knowledge with which he is here charged, and further find that the defendant was at the time he committed these acts suffering from a mental disease or defect, which so affected him that he was incapable of distinguishing

228 right from wrong, or could tell right from wrong but was incapable of controlling his actions, then you would find that the defendant's act was the product of the defendant's mental abnormality. To repeat, however, a person is not relieved of a criminal responsibility merely because he suffers a mental disease or defect at the time of committing the crime or crimes. He would still be held responsible for his unlawful act if there was no causal relation between his mental abnormality and the act.

Basically, of course, there is a presumption of sanity in all cases. Every person is presumed to be sane until the contrary appears. However, when there is some evidence of mental disorder, as here, then the presumption of sanity vanishes from the case and the burden is upon the government to prove beyond a reasonable doubt that at the time in question the defendant was of sound mind, or, if he suffered from a mental disease or defect, that the offense was not caused by the mental disease or defect, just as the burden is upon the government to prove all of the other elements of the offenses.

If you should find that the government has failed to prove one or more of the elements of the offenses charged in count one and count two, as I have defined them to you, then you must find the defendant not guilty upon these counts.

229 If you should find that the government has proved all of the elements of the offense known as the crime of robbery and all of the elements of the

offense known as the crime of rape, but you have a reasonable doubt as to whether the offense or offenses were the product of a mental disease or disorder in the defendant, at the time he committed the offenses, then you would, as to such count or counts, find the defendant not guilty by reason of insanity.

If, however, you should find that the government has proved either the robbery count or the rape count, or both, and also has proved beyond a reasonable doubt, either that the defendant was of sound mind at the time of the offenses, or that the acts were not caused by mental disease or defect from which the defendant may have been suffering, then you may find the defendant guilty under such counts.

Upon this issue of insanity the Court permitted two groups of witnesses to testify, the one group consisting of the two doctors, the other group consisting of relatives of the defendant or friends who had opportunity to observe his conduct. It is a rule of evidence that witnesses are not permitted to express opinions upon the witness stand. There are limited exceptions to this rule: one of the exceptions is in the case of expert witnesses.

The attorneys on Friday afternoon had each of these doctors
230 testify as to his background, his training and his experience, in order to permit the Court to determine whether the witness was an expert in his field. When the Court determines that a witness is an expert in his field, the Court then permits the witness to express opinions upon matters in the field of his specialty.

Similarly, there is an exception to the general rule of evidence that permits persons to testify as to sanity or insanity, when they have had occasion to observe a person under conditions where they could evaluate his conduct. So that you have had opinion testimony from several people.

Why is this worthy or necessary to comment? It is necessary of comment upon my part because there is a rule of our courts that opinion evidence is not binding upon jurors. You are not bound to accept the opinion of the expert witnesses who testified before you.

The reason for this rule is a very obvious one if you think about it for a minute. If you were bound to accept the opinion of these expert witnesses, these witnesses who express opinions, your function as trier of facts would be taken away by those expert witnesses who by their opinions would be making findings of fact. So the rule is that you are not bound to accept the testimony of these witnesses.

You should not arbitrarily disregard the testimony of any witness expressing opinion with the Court's approval. You should consider the
231 background of the witness, his training, his experience, his or her opportunity to observe the defendant under varying circumstances, and, as you do in the case of every other witness, you should give to the testimony of these witnesses such weight as in your judgment the testimony is fairly entitled to receive.

If in this case your verdict is not guilty by reason of insanity, this means that the Court will then direct the defendant's confinement in a hospital for the mentally ill until the superintendent has certified and the Court is satisfied that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, and in which event and at which time the Court will then order his release on such conditions as the Court may see fit to impose.

You are the sole, the exclusive, judges of the facts in this case. It is your responsibility to reach a verdict in accordance with the solemn oath you took that you would well and truly try the case and a true verdict render in accordance with the evidence and in accordance with the law as it is given to you by the Court.

Your verdict should not be influenced by your feelings or your emotions. We sometimes say in this type of case that it is a case which should be decided by your mind and not by your heart. In other
232 words, you must be objective and not emotional in reaching your verdict in this type of case. You must consider this matter deliberately and carefully in the light of the instructions on the law which I have given to you. In reaching your conclusion you must use the same common

sense, the same approach, the same intelligence which you would employ in determining any important matter in the course of your own daily lives.

Your verdict, of course, must be a unanimous one.

There are two counts in this indictment. Upon the first count of the indictment, which is the robbery charge, you may return any one of three separate verdicts. You may find the defendant either guilty or not guilty by reason of insanity, or not guilty.

Upon the second count of the indictment, the charge of rape, there are five possible verdicts which you may return upon this count of the indictment. The first possible verdict is guilty with recommendation of the death penalty; the second possible verdict is guilty, without any recommendation as to punishment; the third possible verdict is guilty of assault with intent to commit rape; the fourth possible verdict is not guilty by reason of insanity; or the fifth possible verdict is not guilty.

I will repeat, on the first count of the indictment you have three possible verdicts; guilty, not guilty by reason of insanity, or not guilty.

233 Upon the second count, you have five possible verdicts: guilty with recommendation of the death penalty, or guilty without recommendation, or guilty of assault with intent to commit rape, or not guilty by reason of insanity, or not guilty.

Will counsel come to the bench.

(At the bench:)

THE COURT: Does the government request any further charge, Mr. Titus?

MR. TITUS: No, Your Honor.

THE COURT: Do you have any objection to the charge as given?

MR. TITUS: No, sir.

THE COURT: Mr. Robinson, does the defendant request any further charge?

MR. ROBINSON: Yes. I don't think that the Court covered as fully and adequately as I had outlined in the proposed instruction. I think there was an over-emphasis on the test.

THE COURT: The first question is: Do you request any further charge?

MR. ROBINSON: No further instructions.

THE COURT: Now, do you have any objections to the charge as given?

MR. ROBINSON: Yes.

234 THE COURT: What is your objection?

MR. ROBINSON: That the instruction on the burden of proof upon the government on the insanity issue was not covered as adequately as set forth in the proposed instruction; and secondly, that there appeared to be an over-emphasis upon the second test requirement, which the jury must find that the acts were the product or resulted from the mental illness.

THE COURT: The Court pointed out to the jury, Mr. Robinson, when there is any evidence of mental disorder, the presumption of sanity vanishes from the case and the burden is upon the government to prove beyond a reasonable doubt not only that the defendant, to prove beyond a reasonable doubt that the defendant was of sound mind and so on. I think the instruction is adequate. It is an instruction which I have taken from the case of United States v. Milton Niport, Criminal No. 31-58, which I understand has been approved by the Court of Appeals. Do you have any other objection to the charge?

MR. ROBINSON: No.

* * * * *

237 (At 4:04 p.m. the jury returned to the courtroom, and the following occurred:)

THE MARSHAL: Defendant rise and face the jury.

THE CLERK: Mr. Foreman, has the jury agreed upon its verdict?

THE FOREMAN: We have.

THE CLERK: What say you as to the defendant David Dukes on count one of the indictment, which is robbery?

THE FOREMAN: Guilty.

THE CLERK: What say you as to the defendant David Dukes on count two of the indictment, which is rape?

THE FOREMAN: Guilty.

THE CLERK: Members of the jury, your foreman says your verdict in this case is that the defendant David Dukes is guilty on count one, which is robbery, and guilty on count two, which is rape, and that is your verdict so say you each and all?

(It is.)

* * * * *

238 THE COURT: I wanted to advise you ladies and gentlemen of the jury in this case, in which you just returned a verdict, that this defendant stands indicted in two other cases for the same type of offenses, robbery and rape, with two other women, one of them a girl

239 fifteen years of age. It was for this reason that we had several bench conferences, because Mr. Robinson and Mr. Lawson didn't know whether it was to the defendant's advantage to bring these facts out so that you could hear them or whether it was to his advantage to withhold them. And of course they had to make a calculated decision upon that point. But I know that on Friday, when we had five or six bench conferences here in rather short succession, I am sure you were a little annoyed at the fact that there was something going on in the courtroom about which you were not informed. The discussion related to the two other cases in which, I repeat, in a period between November 10th and 21st, this defendant in two other cases robbed and raped or assaulted with intent to commit rape two other women. So that those charges are still pending against the defendant but the discussion at the bench, and especially with reference to the history of the psychiatrist, was designed to protect the defendant from anything that would jeopardize your decision upon this case, because, as you know, you must make your decision upon the facts only in the case that is before you at that time.

But in view of this background of the defendant, and the fact that nothing that the Court says to you now can influence your verdict, I thought you should know that background.

[Filed October 2, 1959]

1

Washington, D.C.
July 2, 1959

The defendant in the above-entitled matter came on for sentencing before the HONORABLE EDWARD A. TAMM, Judge, at approximately 10:30 A.M.

* * * * *

2 MR. ROBINSON: At this time, Your Honor, I would like to orally move the Court for a judgment of acquittal notwithstanding the verdict of the jury, or in lieu thereof, a new trial, based upon a number of things.

One, what counsel feels was insufficiency of evidence; the admission of certain exhibits which we feel were not sufficiently connected with the defendant.

THE COURT: Which exhibits specifically, Mr. Robinson?

MR. ROBINSON: Exhibits 2 and 4, Your Honor.

Two, I believe, was the watch; four was the laboratory technician's report from the D.C. General Hospital.

Specifically, with reference to those two, the admission of those two exhibits; and thirdly, on the issue of insanity, which we feel failed to sustain its burden of proving that at the time of the commission of the acts the defendant was in fact sane; and counsel feels there was not sufficient evidence to go to the jury on that question to enable them to find as a fact that the defendant wasn't of unsound mind at the time or that the crimes were not the product of any mental illness.

For those various reasons we ask the Court for a judgment of acquittal notwithstanding the verdict, or in lieu thereof, a new trial.

THE COURT: I believe upon the entire record the Court must

3 deny your motion, Mr. Robinson.

Is there anything more? Is there anything you want to say in behalf of the defendant prior to imposition of sentence?

* * * * *

[Filed July 7, 1959]

JUDGMENT AND COMMITMENT

On this 2nd day of July, 1959 came the attorney for the government and the defendant appeared in person and by counsel Wm. Robinson, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of ROBBERY & RAPE as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years to Fifteen (15) years on count one; Ten (10) years to Thirty (30) years on count two, the sentence on count two to run concurrently with the sentence imposed on count one of the indictment.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Edward A. Tamm
United States District Judge

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[Filed July 13, 1959]

NOTICE OF APPEAL

Name and address of appellant: David Dukes, c/o D.C. Jail.

Name and address of appellant's attorney:

Offense: Rape and Robbery.

Concise statement of judgment or order, giving date, and any sentence: 10 to 30 years, concurrently; July 2, 1959.

Name of institution where now confined, if not on bail: District of Columbia Jail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Date: July 13, 1959

/s/ David Dukes
Appellant

* * *

[Filed July 13, 1959]

AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE TO PROCEED WITHOUT PREPAYMENT OF COSTS

I, David Dukes, being first duly sworn according to law, depose and say that I am the defendant in the above-entitled cause, and, in support of my application for leave to proceed in said cause without being required to prepay fees or costs, state as follows:

1. That I am a citizen of the United States.
2. That because of my poverty I am unable to pay the costs of said suit or action.
3. That I am unable to give security for the same.
4. That I believe I am entitled to the redress I seek in said suit or action.
5. That the nature of my cause of action is briefly stated as follows:

   An appeal from conviction and judgment on a two-count indictment based upon my defense of insanity.

[Jurat dated July 13, 1959] /s/ David Dukes

Let the applicant proceed without prepayment of costs.
F. Dickinson Letts, JUDGE